CASE AND COMMENT

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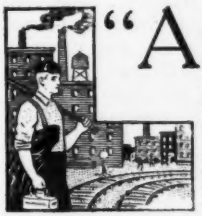
Assumption of Risk

BY WALTER M. GLASS



"AND all the authorities, text writers, and courts unite in holding that if the master negligently fails to furnish the servant such a place [safe place], and the latter is injured in consequence thereof, then it cannot be successfully maintained that such injury was the result of a risk assumed by him." [1]

If the above statement is true, and statements to the same effect can be found in almost innumerable decisions and legal articles, what becomes of that vast number of cases in which the servant is precluded from recovery upon the ground of assumption of risk notwithstanding the injuries were caused by the negligence of the master? In almost every jurisdiction in this country, the defense of assumption of risk is the one mainly relied upon by the counsel for the master, and this notwithstanding the existence in the very same jurisdiction of general statements by the court that the servant never assumes the risk of the master's negligence.

It is for the purpose of throwing some light upon this paradoxical situation that this article is written. In the beginning, it must be said that it is an utter impossibility to reconcile all of the various statements in regard to this doctrine that have appeared in the decisions. But, nevertheless, the conflict is much more apparent than real, and the difficulty lies rather in explaining loose writing than in reconciling conflicting views. And as statutes abolishing wholly or in part the defense of assumption of risk are being enacted in the various jurisdictions every year, it is very important that it be thoroughly understood to what extent the law of master and servant is modified by statutes of this character.

To understand intelligently the subject of assumption of risk it must be borne in mind that the phrase is used in three distinct senses, distinguished by the character of the risk incurred by the servant: First, the phrase is used with reference to such risks only as remain after the master has exercised reasonable care to remove them; second, the phrase is used in respect to risks created by the master's negligence which are not primarily assumed by the servant, but which are assumed by him when, with knowledge of the defective conditions and with appreciation of the danger arising therefrom, he remains voluntarily in the employment; third, the phrase is sometimes used in reference to risks which are created by the master's negligence, but which are so great and imminent that a reasonably prudent man would not remain in the service.

It is to be noted that, in the first use of the phrase, neither party is negligent, in the second, the master only is negligent, and in the last sense, the mas-

[1] George v. St. Louis & S. F. R. Co. 225 Mo. 364, 125 S. W. 196.

ter is negligent, and the conduct of the servant tested by the almost universal criterion of negligence is also negligent, but his culpability does not consist in doing his work in a reckless or negligent manner, but only in remaining at his work after the danger has become so great that a reasonably prudent man would not incur it. This view has been adopted in North Carolina as the general rule, and a similar rule is also laid down in many other jurisdictions where some subsidiary element enters into the case, as where the master has promised to repair the defects, or where the servant is acting in accordance with a direct command or an assurance of safety given by the master.

In order to more clearly understand the fundamental distinction between these senses in which the phrase is used, it should be remembered that in every case involving employer's liability there can be no recovery unless the master has been negligent,—has been guilty of some breach of duty owing by him to the servant; at least, there can be no recovery in the absence of some special contract or statute expressly providing therefor. Consequently if the servant fails to show that the master has been negligent, he cannot recover; not primarily because the servant has assumed the risk of the injury or in any way waived his rights, or has failed to exercise due care, but simply because the master has not incurred any liability.

Thus, it will be readily seen that every risk which a servant may incur in any employment naturally falls into one or the other of two classes, mutually exclusive of each other: First, those which are not created by the master's negligence,—which remain after the master has used due care to remove them, or the ordinary risks of the service; and, second, those risks which are created by the master's negligence, or the extraordinary risks.

In most, if not in all, employments some dangers remain after the master has fulfilled his full duty to the servant in furnishing a place, appliances, tools, and competent fellow servants, and in all other ways. But, however dangerous the service may be, if the master has not been negligent in doing his duty, he is not liable. It should be noted that frequently a master is held liable for injuries to an inexperienced servant or to a minor caused by risks which could not be removed by the exercise of due care, but in such cases the liability is based not on the dangers of the service, but upon the master's negligence in failing to give instructions or warning. Such dangers, therefore, are to be classed with those created by the master's negligence.

It is a universal rule that a servant by his very act of entering the service, by his very contract of employment, assumes these ordinary risks of the service, and if he is injured solely because of them, he cannot recover. The reason why such risks are held to be assumed by the servant by his contract is that he must necessarily have had such risks in mind when he made his contract, and that his compensation was fixed in reference thereto. But this rule does not extend to risks created by the master's negligence. It is true that in a few decisions it is said that if the defective conditions are obvious and existed at the time the servant entered the employment, he will be deemed to have made his contract with reference thereto, but this view is not wide spread, and is expressly repudiated in most jurisdictions.

It thus appearing that according to the general rule the servant does not, by his contract of employment, assume the risks created by the master's negligence, the question then arises, when, if ever, does the servant assume such risks?

Any breach of the master's primary duties to the servant, such as a failure to use due care in furnishing a reasonably safe place and appliances or tools, renders the master *prima facie* liable to his servant for any injuries proximately caused thereby. But such liability of the master is only prima facie and may be rebutted, and is rebutted, according to practically every decision in which the question is expressly before the court and adjudicated by it (with the exception of decisions in Missouri and North Carolina), by proof that the servant, with actual or constructive

knowledge of the defects and appreciation of the danger, voluntarily entered or continued in the employment. By so entering or remaining in the service, the servant is held to have assumed the risk of such defects, notwithstanding they are the result of the master's violation of his duty.

Such an assumption of risk is clearly distinct from that assumption of risk of the ordinary dangers which was discussed above. Assumption of risk, as applied to the ordinary risks of the service, is merely a rhetorical phrase used to connote the idea that the master is not an insurer against injuries resulting from dangers which cannot be removed by the exercise of due care on his part. In the second sense, the assumption of risk has a vastly different significance. It implies negligence on the part of the master and a prima facie liability, but it also implies a waiver of the effect of that negligence, and is an affirmative defense which rebuts that prima facie liability which arises from the master's negligence. Assumption of risk in the first sense is not a distinct proposition of law, but is merely a mode of expression which adds nothing distinctive. The servant cannot recover, not because of any rule of law as to assumption of risk, but because of the absence of a breach of duty on the part of the master. In the second sense, assumption of risk is one of the fundamental principles of the law of master and servant, and is relied upon by the master to relieve himself from that prima facie liability arising from his negligence, more than any other defense which is open to him.

As a natural result of this use of the phrase "assumption of risk" in two senses so entirely distinct, much confusion has arisen. It is to be regretted, on the one hand, that the phrase lends itself so readily in a rhetorical way to express the condition in which the servant is placed where the master is not negligent, and that, on the other hand, it has a peculiar distinctive technical meaning embodying a special affirmative defense which relieves the master from the consequences of his negligence; and it is perhaps even more to be regretted that the term is so often used with no explanation as to which meaning is intended.

Assumption of risk in the sense of an affirmative defense relied upon by the master to relieve himself from liability for his negligence is dependent wholly upon the knowledge, actual or constructive, of a servant of the existence of the danger, and without knowledge of the danger there can be no assumption of risk as used in this sense. It is said in a number of cases that, as a general rule, a servant never assumes the risk of the master's negligence, but that this rule is subject to an exception where the servant continues in the service with knowledge of the negligence of the master and an appreciation of the danger therefrom. This statement is correct undoubtedly from a practical standpoint, but it is probably contrary to the historical development of the doctrine of assumption of risk of dangers created by the master's negligence.[2]

As was said in the beginning, many cases have stated broadly and without any apparent qualification that a servant never assumes the risk of dangers created by the master's negligence. Passing over for the moment the decisions in Missouri and North Carolina, it can be said that, in the absence of statute, such statements contain but a half truth. While it is true that *primarily* the servant never assumes the risk of the master's negligence, yet every jurisdiction, with the exception of the two noted, does hold that the servant assumes the risk of the master's negligence if he knows thereof. The general rule is that the servant does not assume the risk of the master's negligence *except where he knows of it*, but the exception is as broad in its application as is the rule, and any statement of the rule which omits the exception is misleading.

In the great majority of the cases in which the statement that a servant never assumes the risk of the master's negligence is made without any qualification, it will be found upon examination that the language was used with reference to the particular state of facts before the court, as in a case where the servant did

[2] 1 Labatt, Mast. & S. 620; Potts v. Plunkett, 9 Ir. C. L. Rep. 290.

not have actual knowledge of the danger and could not, under the circumstances, be chargeable with knowledge thereof. In some cases it will be found that the court had in mind the risks assumed by the servant by his contract of employment, so that the effect of the servant's knowledge of the master's negligence was not within the contemplation of the court. So, too, such a statement would apply where the risk resulted immediately, in point of time, from the negligent act of the master or of his superintendent. But such statements, although correct when limited to the facts of the case before the court, are unlimited in form, and taken out of their setting are very misleading.

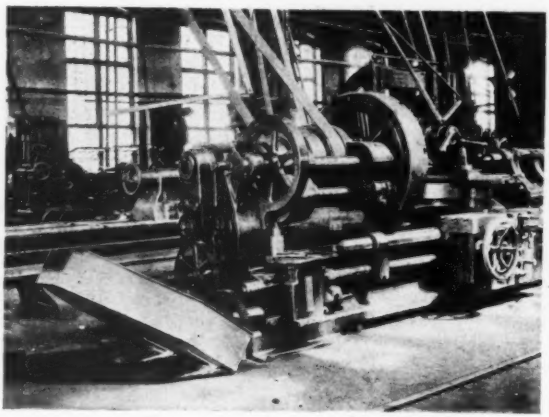


Photo by Brown Bros., N. Y.

Steel guards for gears of lathes, that may be swung aside when changing gears.

One of the most conspicuous examples of the misleading effects of such general and unqualified statements is found in a Missouri decision[3] where the court was called upon to decide a case arising in Kansas. The court, applying the so-called Missouri rule, held that as the master had been negligent there could be no question of assumption of risk in the case. The court admitted that it must yield to the decisions of the highest court of the sister state in which the action arose, as to the law of that state, but said that it appeared that the Kansas court[4] had laid down the law in respect to assumption of risk in effect the same as it had been declared by the Missouri court, and it also quotes from a Nebraska case[5] cited in the Kansas case. In both of these cases it is true that the court states in general terms that a servant never assumes the risk of the master's negligence; but in the Kansas case the court was dealing with a defect which could not have been discovered by the servant by any reasonable investigation; and the court expressly says in another part of the opinion that if the servant knows of the negligent conditions, and continues in the service without objection and without a promise on the part of the master to repair, he is properly held to have assumed the risk. And in the Nebraska case, in the very portion of the opinion quoted in the Missouri case, the court shows in express terms that it is speaking of the risks assumed by the contract of employment merely. The so-called Missouri doctrine has never acquired the slightest foothold in either Kansas or Nebraska, and the Missouri court was misled by the general statements made by the Kansas and Nebraska courts, which do not add the necessary qualification to the general rule.

But a still more misleading form of statement very frequently found is that purporting to state the general rule as to assumption of risk, but which either entirely overlooks the effects of the servant's knowledge of the master's negligence, or fails to give it its proper significance. The rule is found frequently stated substantially as follows: A servant never assumes the risk due to the

[3] Lee v. Missouri P. R. Co. 195 Mo. 400, 92 S. W. 614.

[4] Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232.

[5] O'Neill v. Chicago, R. I. & P. R. Co. 62 Neb. 358, 60 L.R.A. 443, 86 N. W. 1098.

master's negligence, but only assumes the ordinary risks incident to the employment and those of which he knows or ought to know. Such a statement of the rule, and many such may be found, entirely ignores the fact that the plaintiff's knowledge of the risk is entirely immaterial when that risk is one of the ordinary risks of the service, and that the knowledge of the servant of risks due to the master's negligence has the practical effect of placing such risks on the same level as ordinary risks, so as to preclude equally with ordinary risks any recovery for injuries thereby.

Missouri alone of all the states, with the possible exception of North Carolina,—to be discussed later, — has adopted the rule, in the absence of statute, that a servant does not assume the risk of the master's negligence even with knowledge thereof. In this jurisdiction the moment that the master is negligent the question of assumption of risk disappears, and the master is confined to the defense of contributory negligence. This rule has not been adopted without great conflict of opinion, even in Missouri, and there are a large number of decisions which it is difficult to harmonize with this rule. But the language of a large number of the more recent decisions [6] of the supreme court makes it plain that assumption of risk cannot be relied upon by the master where he has been negligent, even though the servant may have knowledge thereof. In Missouri, however, as in all other states, there can be no recovery for injuries due to the ordinary risks of the service; such risks are "assumed" by the servant.

In North Carolina the courts have enunciated a distinct doctrine, which, however, arrives at the same practical result as that reached by the Missouri courts in applying the so-called Missouri doctrine. According to this North Carolina rule, a servant does not assume the risk of dangers created by the master's negligence, merely because he knows of them, but is held to assume them only when a reasonably prudent man would refuse to continue at work in the face of danger. This is an illustration of the third sense in which the phrase "assumption of risk" is used. If a servant remains at work in the face of dangers which a reasonably prudent man would not incur, he is, according to the test universally applied, guilty of negligence, and consequently the North Carolina rule may be stated as follows: A servant does not assume the risk of dangers created by the master's negligence unless he is guilty of contributory negligence in so doing. This practically eliminates the question of assumption of risk, because it makes the test of the servant's conduct the ordinary test of negligence. But the courts, although in effect abolishing the distinction between assumption of risk and contributory negligence, retain the terminology and thus

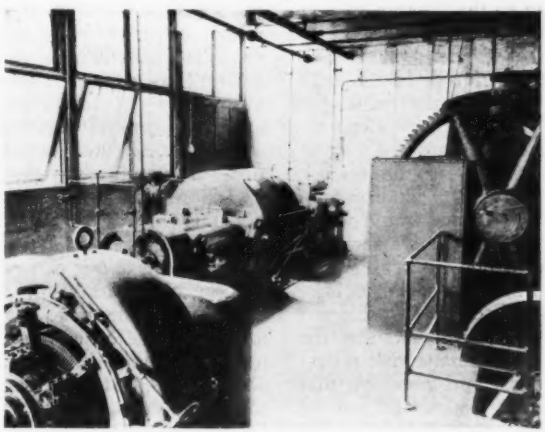


Photo by Brown Bros., N. Y.

Model engine room showing all wheels and cogs covered or railed off.

[6] See particularly Daken v. G. W. Chase & Son Mercantile Co. 197 Mo. 238, 94 S. W. 944; Blundell v. Wm. A. Miller Elevator Mfg. Co. 189 Mo. 552, 88 S. W. 103; Curtis v. McNair, 175 Mo. 270, 73 S. W. 167; Cole v. St. Louis Transit Co. 183 Mo. 81, 81 S. W. 1138.

add to the confusion upon this subject.

Assumption of risk in the sense in which it is used in North Carolina has been spoken of as negligent assumption of risk. While there seems to be no necessity whatever for the retention of the term used in connection with risks created by the master's negligence in North Carolina, still if it is designated as a negligent assumption of risk, no confusion would necessarily follow its use. It should be noted that in a few of the more recent decisions in North Carolina the courts have expressly held that in case of the master's negligence assumption of risk is not a defense, and the master is confined to the defense of contributory negligence.[7]

The application of the general doctrine of assumption of risk of the master's negligence is frequently modified in particular cases by subsidiary elements, as where the master has promised to repair the defect, or where the servant is acting under a direct command of the master or an assurance of safety on the part of the master. Under such circumstances, a large body of cases hold that the servant will not be held to have assumed the risk. Frequently the court says that under such circumstances the servant does not assume the risk unless the danger is so great and imminent that a reasonably prudent man would not incur it. This is a further illustration of the third sense in which the phrase assumption of risk is used. Of course the servant must always act with due care for his own safety, and a statement that the servant does not assume the risk unless the danger is so great and imminent that a reasonably prudent man would not incur it is but another way of saying that the servant does not assume the risk unless he is guilty of contributory negligence. In the third sense, strictly speaking, the doctrine of assumption of risk is entirely eliminated and only a question of contributory negligence remains.

The application of the doctrine of assumption of risk has been in recent years much modified by statute, and the statutes so modifying it may be divided into three clases: First, the statutes which expressly abolish the defense in all actions by the servant against the master; second, those statutes which expressly abolish the defense as to particular employments; third, those statutes which abolish the defense where the master has violated some particular duty imposed upon him by the statute.

Of the first class of statutes the New York employers' liability bill (Laws of 1910, chap. 352) is a type. This statute provides that an employee shall be presumed to have assented to the necessary risks of the occupation or employment, which necessary risks are to be considered as those which remain after the master has exercised due care in providing for the safety of his employees and has complied with the laws affecting or regulating such business or occupation. The statute further provides: "In an action brought to recover damages for personal injury or for death resulting therefrom received after this act takes effect, owing to any cause, including open and visible defects for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom, shall not be, as matter of fact or as matter of law, an assumption of risk of injury therefrom."

Of the second class of statutes the Federal employers' liability act of 1908 (act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1909, p. 1171) is a type. Section 4 of this statute provides that in any action brought against any common carrier, under any of the provisions of the act, for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Another similar statute is chapter 56,

[7] Bennett v. Caroline Mfg. Co. 147 N. C. 620, 61 S. E. 463; Sibbert v. Scotland Cotton Mills, 145 N. C. 308, 59 S. E. 79; Leggett v. Atlantic Coast Line R. Co. 152 N. C. 110, 67 S. E. 249.

Private Laws of 1897 of North Carolina, which provides that any servant or employee of any railroad company who has been injured by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company, and "that any contract or agreement, express or *implied*, made by any employee of said company to waive the benefit of the aforesaid section shall be null and void."

As typical of the third class of cases may be cited the Federal safety appliance act of 1893, which expressly provides that where a servant is injured by the failure of the master to obey the requirements of the statute, the defense of assumption of risk shall not be available.

In addition to the statutes which expressly abolish the defense of assumption of risk, or at least abrogate it in certain cases, there should be noted the large and apparently growing number of decisions which hold that where a servant is injured by the master's violation of an express duty imposed upon him by statute, the defense of assumpton of risk is not available. It is to be noted that in the leading case upholding this view the opinion was written by Judge Taft,[8] and that the courts are more and more coming to adopt his views upon the question; and in some jurisdictions where the courts have refused to adopt such view, the provision that the defense will not be available has been expressly made in the statute itself.

In conclusion it may be stated that the doctrine of assumption of risk may be briefly expressed as follows: The servant assumes all the ordinary risks of the service and all of the risks due to the master's negligence of which he knows and the dangers of which he appreciates. Stated in this form the rule is followed, in the absence of statute, in all jurisdictions except Missouri and North Carolina, but in particular cases its application is sometimes modified by some subsidiary element, such as the master's promise to repair, etc.

There is, indeed, no occasion for the use of the phrase "assumption of risk" in any but the second sense indicated above; namely, where the master has been negligent, and the servant, although free from negligence, is precluded from recovery because, with knowledge and appreciation of the danger he voluntarily remains in the service. This has been called "assumption of risk in its true sense." If the courts and legal writers generally would limit the use of the term to this sense, there would be avoided, on the one hand, its use to express merely the equivalent of the legal principle that a master is not an insurer of the servant's safety against dangers which reasonable care on his part cannot remove, and, on the other hand, its use to express merely one form of contributory negligence.

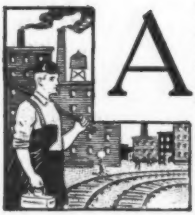
The great necessity of keeping the first and the second meanings of the phrase "assumption of risk" distinctly in mind can be shown by two statutes passed by the New York legislature in the session of 1910. In one of these, as has already been shown, assumption of risk in the second sense has been abolished; since a servant is no longer in that state precluded from recovery by merely remaining in the service after he has knowledge that the master has been negligent. So far as the writer knows, the validity of this act has not been passed upon by the courts, but in its opinion in another case the court of appeals has said that it was clearly within the power of the legislature to abolish such an assumption of risk. By the other statute, the legislature attempted to make the master liable for injuries received in certain occupations, although he had not been guilty of negligence. This in effect sought to abolish the defense of assumption of risk in its first sense. But the statute, for this very reason, was held to be unconstitutional; and it therefore should be borne in mind that when a statute provides for the abolishing of the defense of assumption of risk, it has reference solely to assumption of risk in its true sense, namely, assumption of those risks which are created by the master's negligence.

[8] Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

The Doctrine of Contributory Negligence

BY DUKE STONE

Of the Oklahoma City (Okla.) Bar



AS to the question of contributory negligence, it may be said as a general rule that where the negligence of a servant so far contributed to his injury, that it would not have occurred but for such negligence, he cannot recover, with the general exception that if the injury is caused by the gross or wilful negligence of the master or vice principal, or if the consequence of the servant's negligence might have been avoided by the exercise of ordinary care on the part of the master, the servant may yet recover, notwithstanding his negligence.

It is the general rule that the failure of the master to comply with statutory requirements for the safety of his servants does not deprive the master of the right to plead and rely upon the contributory negligence of the servants. The rule is different, however, in respect to the defense of assumption of risk.

Statutory Exclusion of Defense.

In a number of jurisdictions a statute has been passed excluding the defense of contributory negligence. This is true in Illinois, Kentucky, Missouri, North Carolina, Wisconsin, and Tennessee, and the Federal courts sitting in these states have followed and upheld such statutes.

In the case of Fulton v. Wilmington Star Min. Co. 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 193, it is held under the Illinois statute that a Federal court is bound by a construction given by the courts of the state in which it is sitting, to a statute imposing liability upon mine owners for death of employees, to the effect that it takes away the defense of contributory negligence. The Thompson & S. Tenn. Code, §§ 1298 and 1399, provides that railroads shall keep an engineer or fireman on the lookout ahead, and that when persons or obstructions appear on the track, the alarm whistle shall be sounded and the brakes put down, and that for failure to observe the prescribed precautions the railroad shall be liable for the injury done. The Kentucky Court of Appeals in the case of Illinois C. R. Co. v. Jordan, 117 Ky. 512, 78 S. W. 426, held that this law imposed an absolute liability for failure to observe the prescribed precautions, and that contributory negligence operated only to mitigate damages.

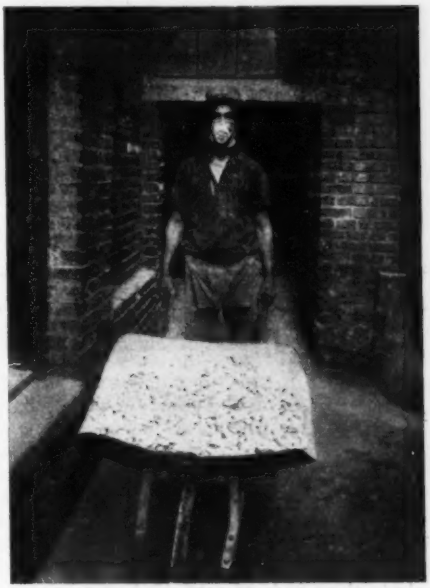
By § 1123, Rev. Stat. of Missouri, of 1899, it is provided that all railroad companies shall block all switches and frogs in all yards, divisions, and terminal stations, and where trains are made up; and § 1125 provides that in all actions for injuries to one, or for the death of one, owing to noncompliance with the former section, contributory negligence shall be no defense.

The Federal employers' liability act of 1908 provides that the loss should be divided in proportion to the demerits of the two parties, leaving the question of the extent and comparative negligence of the master and servant to the jury. The objection to this is that as a general rule the jury will decide in favor of the employee.

Defense of Contributory Negligence.

Outside of a statute, the general theory of the defense of contributory negligence is easily understood. The plaintiff bases his case upon the master's negligence,

but the servant himself has been negligent, and without the servant's negligence the injury would not have happened; and when there is no statute authorizing the dividing up of the consequences there can be no recovery, unless perchance the rule of comparative negligence applies, and we believe that all those states generally which have adopted or followed the comparative negligence rule have sooner or later repudiated it; still there is some good in the rule. The fact is, if it were practical, it would be the most just rule to apply in cases of injury due to the negligence of both parties. The contributory negligence rule is a just rule, generally. It, like the original rule of the fellow-servant doctrine, has, however, in its strict sense outlived its usefulness in many cases, and is not suited to modern conditions, as is seen by the many statutes; some abolishing the same as a defense in certain cases; some placing a statutory duty upon the master, under which the courts held that an absolute liability is created, and, hence, the defense of contributory negligence is made unavailable. We meet with much more difficulty in applying the proper rule in the matter of contributory negligence than in assumption of risk.



Men who make white lead protect mouth and nostrils by face sieve shown.

Industrial Accidents.

It may be said that men are always careful for their own safety, but practical experience teaches otherwise; for they are just as apt to become careless in their line of employment as the master is in the discharge of his duties, and if servants become careless for their own safety, so, also, do they for that of their associates.

In the hurry, fatigue, and constant attention of a servant in a great industry, where the success of a great plant, perhaps, depends on each man doing his part well, a servant's sensibility and attention may become dulled, and he may do some act which would cause an injury to himself, which we would be ready to term contributory negligence, which would indeed be only a human frailty. No doubt, under the law of assumption of risk and contributory negligence, there are many cases annually for which no recovery can be had against the master. The cases are now annually so numerous, owing to the constant growth of industries, which are both inherently dangerous, and involve the use of powerful and dangerous machinery, that it should challenge our attention and demand serious consideration. The report of the Interstate Commerce Commission shows that during one of the recent years there were, in the United States, 5,631 railroad collisions, 5,910 derailments, 3,804 persons killed, and 82,374 persons injured. During the last three months of that year there were killed and injured by railroads, 20,650 persons. Was this wholesale injury and destruction by railroads alone, and in one year, due to the fault of the master or servant or both, and how is the condition to be met?

There is no doubt that this means a great hardship, which does not, however, in all cases mean injustice, but we

believe that such enormous figures have been the cause of the passage of statutes by many states which seem to be stringent. After all, when the cost is ultimately counted which goes to pay for numerous injuries, it comes, at least indirectly, out of the pockets of the people who patronize the industries or corporations causing injury, and this is not bad from a charitable view only, for, as a rule, the loss or injury falls on a class of persons who, by their financial situation, are hardly prepared to meet it.

One of the most important growing questions of to-day is how to make laws and apply existing ones to meet the hardships caused by industrial accidents.

Question of Fact.

Our Oklahoma Constitution attempted in a measure to meet a portion of the situation by the provision of § 6 of article 22, wherein it provided that "the defense of contributory negligence, etc., shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury," because by this section it was at least intended that the courts should go far in submitting the question of contributory negligence to a jury selected from among the people; even if this rule meant no more than the law which existed prior to its adoption generally, still, it certainly intended to emphasize the growing sentiment of allowing juries, as far as possible, to be the arbitrators. But suppose a case to exist where the evidence shows conclusively to the minds of all reasonable men that the complaining party was guilty of contributory negligence. In that case, does the provision mean that nevertheless the matter should be left to the jury, that is, a matter should be left to the jury about which there is no dispute? Suppose the jury should decide against the existence of an undisputed fact, could the court set it aside when the constitutional provision provides that it shall be left to the jury?

Either the employer or employee must bear the loss. In making stringent liability laws against the employer, it may be said that they are partly justified, on the ground that the master initiates the business. He puts the dangers in operation, and in one sense may be said to get the chief benefits from the business, yet these are not sound rules, and we believe the best reason, and the foundational reason, which justifies the many employees' liability acts, is found in public expediency.

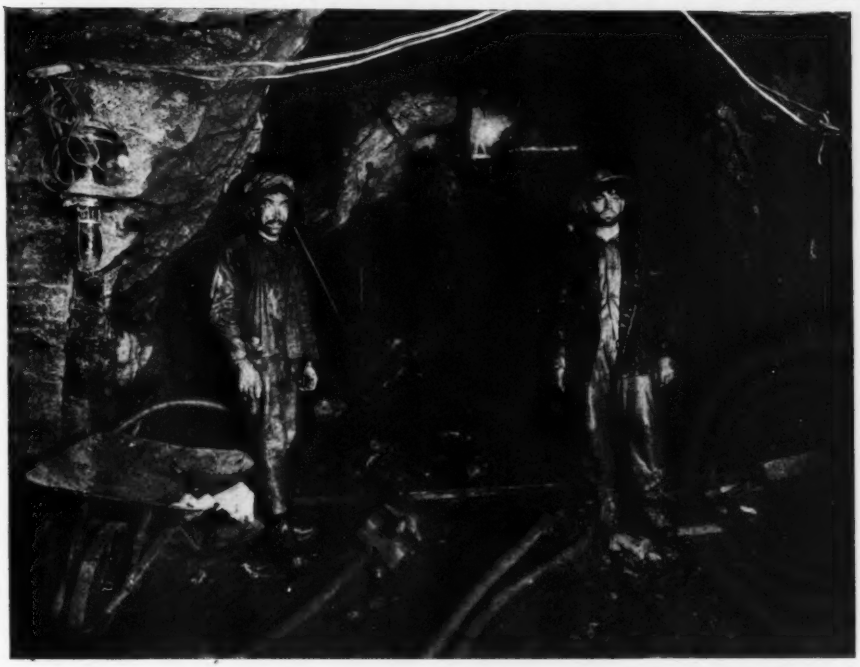
No doubt legislation is fashioned after popular sentiment. If a popular slogan should be: "Let the people rule," then the clause of the Constitution just referred to is perfectly justified, whether it really adds any benefits to our jurisprudence or not.

Continuance in Employment as Contributory Negligence.

We believe the reasonable rule to be that assumption of risk and contributory negligence are approximate where danger is so obvious and eminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, which prudent men, who must earn a living, are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injury, while one who does not use such care and is injured thereby is guilty of contributory negligence. This principle is laid down in the case of Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

Statutory Duties.

We believe the act of Congress to be a good law, because it is just, reasonable, and supported strongly by public expediency. It is just, because it is no undue burden on the mine owner, and tends to preserve his property and the lives of the servants working therein. It is reasonable, because the benefits, both to the mine owner and the servant, are more than commensurate with the cost of maintaining the precaution, and is strongly supported by public policy, because it decreases accidents, and preserves life and property, and tends to promote and encourage precautions. We think, also, for these reasons that our legislature



TOILERS IN THE MINES

Photo by Brown Bros., N. Y.

made a step in the right direction in the passage of our present mining law by Oklahoma Session Laws 1907–8, page 535. By this act very many duties are imposed upon mine operators. They are plain statutory duties. If they are violated, in an action by the servant for injury due directly to failure to provide statutory safeguards, may the master avail anything under the plea of assumed risk? May he avail himself of anything under the plea of contributory negligence? We have already seen the general rule to be by the weight of authority that when a plain statutory duty exists, designed solely for the protection of the employee, that where a servant receives injury by reason of failure to observe the statute, the plea or defense of assumed risk is not ordinarily available, while as to the defense of contributory negligence it is otherwise. This is based on the reason that the servant has a right to assume that the master has complied with the law or statute, and hence cannot be said to have assumed the risk by his contract of employment, while the question of contributory negligence cannot be said strictly to have entered into the contract of employment in any sense. We believe there is wisdom in the act of our legislature (Oklahoma Session Laws 1907–8, page 519) providing for certain precautions to be used in the construction, repair, alteration, removal, or painting of buildings, etc.

It will be noted that this act is very similar to the act of Congress of 1902, placing certain duties on mine owners, in that it prescribes certain precautions to be taken, and makes a failure to comply therewith a misdemeanor. Then in a suit under this statute, may the master avail himself of the defense of assumed risk?

This act in the last section provides: "An employer shall be responsible in damages for personal injury caused to an employee who, himself in the exercise of due care and diligence at the time, by reason of any defect in the con-

dition of the machinery, or appliances connected therewith, or used in the business of the employer, which arose, or had not been discovered or remedied owing to the negligence of the employer, or of any person intrusted by him with the duty of inspection, repair, or of seeing that the machinery or appliances were in proper condition."

There can be no question but that the defense of contributory negligence is available under this act, because it is so provided in unmistakable language, that is, by providing that the employee must be in the exercise of due care or diligence at the time of the injury.

It will be noted that one part of the section quoted reads: ". . . by reason of any defect in the condition of the machinery, or appliances connected therewith, or used in the business of the employer, which arose, or had not been discovered or remedied owing to the negligence of the employer," etc. Now, the act in the first place absolutely places certain duties on the employer, that is certain precautions; suppose, then, that a servant is injured by reason of failure to perform this duty, would the servant in an action for damages for his injury have to base his action strictly upon negligence, or would an action based on the violation of the statute imply negligence?

Suppose the case, where the master has complied with the statute, and the fixtures required should become out of repair so that a servant should be directly injured thereby, then would the servant base his action on the negligence of the master in failing to continue to keep the statutory precautions, or upon negligence in not keeping them in repair, or would there be a distinction between an action based on one, and an action based on the other, that is, would the basis of the two actions be the same under the statute, and if they are the same, why did the legislature use the word "negligence" in the section quoted supra? These are, no doubt, interesting questions that may arise in the construction of this statute. Such statutes suggest to our minds the growing necessity for the extension and modification of the common law regulating the liability of master to his servant.

Applying the Law to New Conditions.

In conclusion, we might say that we have made pretense at discussing in a limited way only, a few of the leading principles that might be of interest to the legal profession. This is an industrial and inventive age, and while there are no new principles of law, yet at the present rate of progress it will keep lawyers busy to apply rules to new conditions.

The time-honored principles of the law of torts have been to a great extent cast aside, and no man can say what will be the rules of liability in the many new situations yet to arise. So far they have not been uniform in the states, due partly to statutory provisions, and due partly to different constructions of the common law.

Ours is a country of progressive independence. This has been due so far to the faithful and impartial construction of our Federal and state Constitutions and statutes and the common law as we have received it from England by the alert, able, and independent judiciaries of our country.—*From address entitled "The Employer's Liability to the Employee," read before the Oklahoma State Bar Association.*

Is the Fellow Servant Rule Becoming Obsolete?

BY HON. J. F. GORDON

Madisonville, Ky., Circuit Judge, Fourth District

IT is interesting to note the origin and progress of the Fellow Servants' Rule. How like a new comet it appeared in the firmament of legal science, flourished for a time with great brilliancy and attracted the attention of the scientists of the law; but experience has taught us that it was an interloper in our system, and after many collisions with well-established stars that have marked our course in the law for centuries, it is now departing, much the worse for wear, to bury itself in the limitless space of speculation, from whence it came, and in a few more years, it will be beyond our vision, and will become a tradition in the law. . . .

Origin of the Rule.

The fellow servants' rule was no part of the common law as recognized and administered prior to the year 1837. It was an innovation pure and simple. It came not from an ancient act of the Lords and Commons, nor was it a usage and custom in the realm of Great Britain, "from a time whereof the memory of man runneth not to the contrary." It was unknown to Sir William Blackstone and Chancellor Kent. Prior to the year 1837, the common law governing the relation of master and servant gave the servant a right of action for a personal injury, inflicted by the negligence of any coservant. The doctrine *respondeat superior* was recognized as an entirety, and the established doctrine was, *Qui facit per alium, facit per se.* Innovations, such as the grafting of the Fellow Servants' Rule upon the body of the common law, arise only from contingencies in human events, which happen to be paramount at the time. Therefore, it might afford us some interest to look into the condition of employers and employees in England about the time and before Lord Abinger made his pronouncement.

In that era of English history, we find that the laboring classes, especially those engaged in the factories, received but little more consideration than mere serfs. The individual laborer was regarded merely as an investment, or a financial asset, and his only importance to his employer was his power to convert his wages into a profitable investment. He was compelled to work in places so unsanitary as to violate all the dictates of common decency. The conditions surrounding the factory labor of England became a public menace, and public sentiment was aroused in labor's behalf; then it was that Parliament passed what is known as the factory act, which attempted to regulate the unsanitary conditions prevailing in these institutions, and in some instances to regulate the age and the hours of labor. This was a recognition of a natural right of labor, and in that day, as in this, such a recognition aroused the ire and fighting spirit of big employers, corporations, and allied interests . . . which recognition they ever regard as a menace to their arrogant powers; and so these factory acts met with their disapproval, and, in the light of ensuing history, is it not reasonable to presume that they were looking about them for some agency or some concession that

would soothe their wounded vanity, and appease their wrath? What more natural than that they should desire to move against labor from another direction, and, if possible, achieve some position to offset the advantages gained by labor under the factory act?

It will pass without wonder that they were among the first to support the new doctrine known as the Fellow Servants' Rule, which, to a cautious ear, sounds like an invention of their own.

Recurring to English history, of the period under consideration, we find that for some years the commercial activities of Great Britain had been rapidly developing; the hum of her spindles was heard around the world; her artisans were producing a world supply in the mechanic arts; and common labor, always considered the grist of the upper and nether mill stones, was being sacrificed in life and limb. In the rush and bustle and whir of strange and new machinery, there was no time for the exercise of due care to protect the servant.

Strangely coincident with these happenings and conditions, and coming like a thunder bolt from a clear sky, was the announcement of a newly discovered principle of the common law,—one which had escaped the attention of all former law writers and jurists, and which the courts of Scotland refused to adopt until forced to do so by Parliamentary action.

Unless it was to protect the "interests" from damage suits, and turn from them the penalty of their own wrongs, why should the courts voluntarily and without suggestion have come to their rescue, and, assuming legislative authority, declare that the servant could not recover for an injury inflicted by the negligence of a fellow servant?

What is supposed to be the first case in which this announcement was made is that of Priestly v. Fowler, 3 Meeson & Welsby's Reports, page 1, opinion by Lord Abinger.

Basis of the Rule.

This rule was first attempted to be justified upon the ground that the servant had the best opportunity to observe the fitness and conduct of his fellow servant; but this reason was exhausted far short of the operation of the rule as it was then applied; for all servants engaged in the common pursuit were declared fellow servants, whether they were present, or acting out of the presence of the injured one, and under circumstances that rendered knowledge and supervision impossible. The manifest injustice of this reasoning, and of the entire rule, for that matter, called for the ingenuity of the sophist to bolster up the theory so essential to public policy, which in this instance simply meant the welfare of the employers, so in the case of Hutchinson v. York, Newcastle, & Burwick Railroad Company, where the question next arose, learned judges substituted contractual obligations as the true basis of the rule, and said that the servant must be supposed, by his contract, to have assumed this risk.

The first case in point in America was Maury v. South Carolina Railroad Company, decided in 1838, opinion by Chancellor Johnson, who recognized the necessity of fortifying this supposition by some principle of the law of contracts that would warrant it. In his argument, he said that the rule rests upon contractual obligations; that the law will not imply an obligation on the part of the master to answer for the skill and care of his coservants, adding, "The law never implies an obligation in relation to a matter about which the parties are, or with proper diligence, may be, equally informed," saying that, with proper diligence, the servant might be as well informed as the master of the unskilfulness of his coemployee. This argument brings us back to the original reason for the rule, and does not relieve the situation where the rule is applied to servants not in the presence and under the immediate supervision of the injured servant.

The question arose in the Massachusetts courts, and Chief Justice Shaw turned it from considerations of justice to the cold-blooded proposition of public policy, which at the beginning of the discussion was evidently the selfish cause of the pronouncement of the rule.

Doubtful Policy of Rule.

May it not be deemed a doubtful policy which protects those who least need it, and casts an enormous burden upon a large class of individuals least able to endure it?

What of the benefit a public policy should bestow upon society as a whole? Is not society called upon constantly to provide, through its charity, for a large army of supplicants rendered helpless and hopeless by this policy, designed to benefit only that class of citizens which stands least in need? Does it not oppress the many for the benefit of the few?

Notwithstanding these just considerations, all the courts of this country followed this rule, though some of them materially modified it; many of them disagreed with others, and with themselves, as to what classes of laborers were fellow servants, within the true meaning of the rule, and some endeavored in their opinions to classify by name the divers positions in service embracing fellow servants, and then altering the rule in particular cases, when they come on for final hearing, so that it might not be known who was a fellow servant until the court of last resort had spoken. Any rule from which can flow such diversity of opinion and such unseemly confusion is necessarily unsound.

Modification of Rule.

A material modification of the rule, as first announced, and which bears upon it in Kentucky, is that announced in Ohio in the cases of the Little Miami Railroad Company v. Stephens, etc., and Cleveland, etc., Railroad Company v. Kerry, declaring that the servant may recover for the gross negligence of a superior agent.

Judge Robertson's Opinion.

The court of appeals of Kentucky in 1868, in the case of the Louisville & Nashville Railroad Company v. Collins, 2 Duvall, 114, 87 Am. Dec. 486, Judge Robertson writing, reviewed this question, and in part adopted the Fellow Servants' Rule, upon the theory that the opportunity of the servant to observe his coservants and their skill was equal to or better than that of the master; and upon the assumed proposition that as between themselves as the employees of a common grade they were not agents of the master. The court limited the doctrine to only such servants as were of a common grade, and followed the Ohio rule, but without quoting it, holding that the master was liable to a servant for an injury caused by the gross negligence of a superior servant, upon the ground that the servant, when he enters the service of the master, might presume that even his superiors would be somewhat negligent and careless, and that such ordinary negligence and carelessness was a part of the danger incident to the service, but that he ought not to be required to bear the results of the gross negligence of his superiors. I dislike to criticize this doctrine, for it puts me in the attitude of criticizing Judge Robertson's opinion, and I fear that I will be regarded as presumptuous; knowing full well the veneration and esteem in which his memory is enshrined, and our long custom of accepting his logic in all cases as the acme of reason and erudition. However, his characterization and criticism of the decisions on this subject afford a better argument against the rule than I can possibly make, and I will reproduce them here with some comment of my own, at whatever cost, as I feel justified in commenting, in the interest of truth, upon an opinion which repudiates its own logic, and evidences a surrender of conviction on the part of the writer which does him no credit. Judge Robertson, after stating the facts from the record, says: "Had the appellee been a stranger, the appellant would therefore have been certainly suable, and responsible in this action, and we cannot admit that the appellee's relation as an employee in its service should exempt the corporation from that general liability, as it might perhaps do by the application of a recent rule adjudged in England, with some exceptions, and echoed with still more exceptions by a few American courts. But this anomalous rule, as sometimes qualified, is in

our opinion inconsistent with principle, analogy, and public policy, and is unsupported by any good or consistent reason."

Speaking of reported decisions in England and America, which hold all servants to be fellow servants when they are engaged in a common pursuit, he says: "We therefore can neither feel the rationale, nor acknowledge the authority of the *crude* and *self-contradictory* decisions, or *loose* and *incongruous dicta,* referred to on that subect."

After this masterful arraignment of the rule and its qualifications, as established by other courts, and after this express declaration that his court could not feel the rationale nor acknowledge the authority of the "self-contradictory opinions," nor the "incongruous *dicta,*" the learned judge seems to have been seized by an irresistible inclination to manufacture some law, and himself become a pathfinder in this wilderness of "self-contradictory decisions," and "incongruous *dicta,*" "inconsistent with principle, analogy, and public policy, and "unsupported by any good or competent reason."

This pathfinding mania is a malady to which many judges of vivacious mind are highly susceptible, and its chief pathological symptom is exalted vanity.

Like most pathfinders, he must follow, for a distance, the trail blazed by his predecessors. He sets his Jacob's staff at an imaginary beginning point, at which all former pioneers had entered the wilderness, and, without hesitancy, he trains his compass upon the line blazed by the English courts, and follows this line for a short distance, for we find him arriving at the identical point reached by the original pioneer, when he says: "Neither of these subordinates . . . is, as between themselves, an agent of the railway company, and therefore it is not responsible for any damage done by one of them to another." At this point he discovers a variation of the magnetic needle, which he computes with care, and announces a new course, saying: "So far the British rule has foundation in both reason and analogy, but beyond this, it is baseless of any other support than a falsely assumed policy or implied contract."

From this point the hardy explorer ventures into the wilderness, and marks his course with monuments seemingly of his own invention; and as we follow his line, we read that the employer is liable for the gross negligence of a superior agent in the same line of service, and for the ordinary negligence of any employee in a different line of service to the one sustaining the injury. Judge Robertson seemingly apologizes for this excursion. He says: "This is the only doctrine we can recognize as consistent with the enlightened and homogeneous jurisprudence of this clearer day of its ripening maturity, and looking through the mist of the adjudged cases and elementary *dicta,* we can see no other fundamental principle which can mold them into a consistent or abiding form."

If the rule was wrong in principle and policy, why did he not say so, and have done with it? Why should a judge compromise with error? Why venture forth as a "bewildered explorer?" Why bother his brain, and confuse mankind, and corrupt the law, by so great an effort to harmonize into a "consistent abiding form," that which he concedes to be "incongruous *dicta,*" "conflicting opinions," "unsupported by any good or consistent reason?"

When he saw this confusion of the legal hosts, why did he not raise the old banner of the common law, with these unqualified maxims, inscribed upon its ample folds, *Respondeat superior, Qui facit per alium, facit per se?*

Around this standard, supported by his strong arm, all save the hirelings and traitors would instantly have rallied, and his reputation would now be even greater than it is.

At the time of the rendition of this opinion, our court of appeals was not bound by any rule of *stare decisis,* nor by any rule of the common law, as it was known in our jurisprudence, to follow, or to harmonize, or attempt to harmonize, any of the opinions of this subject, English or American.

The common law of England was then, and is now, in force in this state, having been adopted by our Constitutions, but only embraced such principles and rules as constituted a part of the

common law, prior to the fourth year of the reign of James I., or March 24, 1607. The fellow servants' rule was not known among these rules and principles, but, by a species of ingenious and expedient analogy, was ingrafted upon the common law two hundred and thirty years after the fourth year of the reign of James I.

Looking back upon the great services of Judge Robertson, which were the product of his mighty genius, we can consider in charity this weakness, for Judge Robertson is not the only judge, living or dead, whose vanity has wrought changes in the law, and needless suffering to mankind.

Fallacy of the Rule.

If the true reason for the rule be that the servant has an equal or greater opportunity than the master for the observation of the conduct and skill of his coemployees, or concurrent authority with him, why require gross negligence of his superior to enable the servant to recover? Surely our observation teaches us that the common employee has no supervision, and ofttimes no observation of his foreman, and would be considered obtrusive and impudent, should he presume to question the skill and judgment of his superior. Would it not be more consonant, with this reason for the rule, to permit the employee to recover for the ordinary negligence of his superior? If it is based on assumed risk, and if it be true that the servant should presume that his superior would be ordinarily negligent about some of the matters connected with his duties, why, by the same token, should we not also presume that the master himself would be ordinarily negligent about some of his primary duties? One is no less human nor less liable to err than the other; yet, the servant does not, under the law, assume even the ordinary negligence of the master or his vice principal.

Many of the southern and western states, about twelve in number, have modified the rule much the same as did Kentucky and Ohio, but the eastern and New England states, being manufacturing centers, found it supposedly more to their interests to adopt the rule in its entirety.

In theory, the rule sounds well, and often we have been charmed with the eloquence and erudition with which learned judges have sought to make "the worse appear the better reason."

When we bring the rule back to earth, and observe closely its practical operation, who can help but be convinced of its fallacy?

Freedom of Contract.

In support of the rule, it is insisted that the servant, if not content to enter the service of the master, alongside of others of whose care and skill he is ignorant or suspicious, he may, with lordly dignity, refuse to labor. This is a fiction, and known to be such by every candid man. The truth is that in our times common labor has but little freedom of choice, especially in and about the industrial centers, where strangers are brought together under ofttimes strange conditions and with strange materials and complicated machinery; many times no three men on the same job speak the same tongue; deliberation and care have been displaced by rush, hurry, and conflict in the mad race to excel. Ofttimes, jobs are few, while laborers are many, and over the disconsolate line that stands in front of the booking office, waiting with a solicitude born of despair, there is cast the shadow of impoverished homes and starving mothers and babes, whose only hope rests upon the chance to labor, for which the man must beg. Very well, say our theoretical friends, if when he gets the job, he finds that his coemployees are negligent and unskilful, he can quit. This is legal right to be sure, but what has become of his boasted liberty to exercise it? He knows that if he quits he must walk the streets in rags, while his helpless wife and children must go hungry to bed. So his necessitous condition forces him to take the chances, for "blood is thicker than water." Even the "Haul away there," of the burly boss, hastens him to his fate, if he stops for an instant to contemplate the dangers which surround him. "But," say the theorists, "you have stated an extreme case." I reply, that

the case is typical of thousands, but if it is an extreme case, so much the better, for it will test the soundness of the rule, for any rule of law which cannot be applied to an extreme case is not sound in an ordinary case.

Public Policy.

This much I have said to show that the fellow servants' rule was no part of the common law, as formerly administered, but that it was an expediency engrafted upon the law of torts. As an extension of the principle of assumed risk, it is so unreasonable and unjust as to find no support in the law of contracts, and that its sole basis is that of public policy, as Mr. Justice Shaw had the candor to admit, and further that it is an unsound policy.

As a matter of public policy, I think subsequent events and public opinion have proven it to be ill advised and unnecessary.

Let us now observe some of these subsequent events:

Repudiation of Rule.

In England, where this rule had its beginning, it was repudiated in part by Parliament under the ministry and leadership of Mr. Gladstone, in 1880, by the passage of what is known as the "Gladstone Bill." Many of the American states, about twenty in number, by the enactment of laws known as the "Employers' Liability Acts" and the "Workingmen's Bills," have repudiated this policy, principally, however, in dangerous employments, such as railroad operation; this movement began in the states as early as 1855, when the Georgia legislature first considered the question and legislated upon it. By the year 1885, the following states had enacted similar legislation, *viz.:* Alabama, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Wisconsin, Montana, and Wyoming. Since that time, many other states have adopted similar legislation. I have yet to learn of but one instance where one of these laws has ever been repealed, and that instance was the law enacted by the legislature of Wisconsin in 1875, which was repealed in 1880, and it is reported upon good authority that this repeal was brought about by the railroad companies.

These enactments by the various states named, and others not named, serve to show the local sentiment, touching the wisdom of this policy, at widely separated points in this country, while the recent enactment of the "Hepburn Bill," by the Congress of the United States, containing a complete repudiation of the Fellow Servants' Rule, so far as concerns employees engaged in interstate traffic, serves to show conclusively the sentiment of the whole country, and to prove that the best thought of our statesmen condemns the policy.

As these matters of public policy arise from conditions paramount at the time, so are they restricted and repudiated by public sentiment enacted into the law, when the error is discovered or the usefulness of the policy is no longer apparent.

The best friends of this policy cannot hope to see it long endure against this active public sentiment.

Rule Becoming Obsolete.

The spirit of the times shows unmistakably that the fellow servants' rule is becoming obsolete, and that it will finally become so in all dangerous employments, if not absolutely so. It may remain with us yet for a while, like a bad habit, but with application only to those simple employments of the older time, like agricultural pursuits, household duties, and kindred employments, as it can more reasonably be employed in such cases; there being a greater opportunity for the servant to observe, and a greater freedom and more liberty of conduct in accepting an employment among the people he understands, and in a service practically free from danger. —Read by the author before the Kentucky State Bar Association.

Compulsory Compensation Without Litigation

BY GEORGE H. PARMELE

THE decision of the New York court of appeals in the Ives Case,[1] stands, in the absence of a constitutional amendment, as an insuperable obstacle to the establishment, in New York at least, of the principle of compulsory compensation to workmen without fault, personal or imputed, on the part of the employer. The remedy for this situation by amendment of the state Constitution is subject to the objection that such an amendment, if adopted, must pass the ordeal of the due process of law provision of the Federal Constitution, and if the United States Supreme Court should adopt the same view of that provision as the court of appeals did of the similar provision in the state Constitution, nothing would avail but an amendment of the Federal Constitution. Moreover, as pointed out in the declaration of the teachers of constitutional law[2] against the decision in the Ives Case, there is an apparent anomaly in engrafting an arbitrary exception to cover a particular situation upon so fundamental a constitutional principle as that of due process of law.

The question, therefore, arises whether the practical benefits proposed by the compulsory compensation features of the labor law may not be accomplished, in a large measure at least, without resort to the doubtful expedient of constitutional amendment. Reflection has convinced the writer that the decision in the Ives Case is more fatal to the theory and principle of the amendatory act of 1910, by which it was sought to add the compulsory compensation feature to the labor law, than to the practical results contemplated by that act.

In the view of the court of appeals the vice of that act lay in the possibility that under it an employer might be compelled to make compensation for an injury without any fault whatever on his part, personal or imputed, actual or constructive, rather than in its practical effect to hold him responsible for the consequences of slight fault or negligence or the failure to exercise a very high degree of care. The common-law standard of care on the part of an employer is that of an ordinarily prudent man, in other words, ordinary care. But while the Ives Case throws the mantle of due process of law about the common-law principle that an employer cannot be held responsible where he is chargeable with no fault,—and in spite of the many criticisms of the decision, the writer is unable to perceive anything novel or revolutionary in that position,—it does not intimate that the common-law standard of duty is protected by that constitutional provision. Indeed, the plain implication of the opinion is to the contrary.

When the employer's conduct is to be tested by the comparatively low standard of care required by the common law, and especially when he may invoke the rules as to contributory negligence, assumption of risk, and the fellow-servant rule, to escape the consequences of his negligence if that is established against him, and may rely on the rule which throws the burden of proof upon the workman, and indulge the hope of procuring a nonsuit or direction of a verdict at the hands of the court, or in the last eventuality may move that a verdict against him be set aside as against the weight of evidence, he may abide the result of a trial with some prospect of

[1] Ives v. South Buffalo R. Co. 201 N. Y. 271, — L.R.A.(N.S.) —, 94 N. E. 431.

[2] Published in the Outlook for June 29, 1911.

success. But if a law were passed substituting for the care of an ordinarily prudent man (the common-law standard), the care of a very prudent man, extraordinary care, the highest possible degree of care (no matter what superlative is used to express the degree of care, or diminutive to express the amount of negligence, so long as the breach of duty however high, or negligence however slight, is made the basis of the liability); providing that the occurrence of the accident shall itself make a prima facie case of negligence, and impose upon the employer the burden of establishing by a preponderance of the evidence freedom from negligence, *i. e.*, of course according to the higher standard of care; and requiring the question in all cases to be submitted to the jury, whose verdict shall be conclusive,—would not the employer, in the vast majority of cases, be constrained by his own interests and the practical hopelessness of success under such conditions to invoke, if possible, the moderate rates of compensation provided for by the voluntary compensation features of the labor law, and thus escape the almost certain result of a larger verdict at the hands of a jury? If so, substantially all the practical benefits of the compulsory compensation feature of the labor law would be accomplished without involving the fatal defect inherent in that act.

As already suggested there is a fair inference from the opinion in the Ives Case itself that there would be nothing unconstitutional in raising the standard of care incumbent upon the employer, so long as the lack of some degree of care is not altogether dispensed with as a condition of liability; and that case expressly concedes that it is within the power of the legislature to abrogate the rules as to contributory negligence, assumption of risk, and the fellow-servant rule. The power to establish prima facie rules of evidence is undoubted, although it is otherwise as to conclusive presumptions. The withdrawal from the courts of the right to take the case from the jury, or set aside a verdict as against the weight of evidence, if limited to employers' liability cases, might, perhaps, be questioned on the ground of unconstitutional discrimination and denial of equal protection of laws, but this feature of the proposed law would not in any event be indispensable to its practical effect. It is true that under such a law it would still be possible for an employer in any case to compel the submission of the question of his liability to the jury, and to that extent frustrate one of the prime objects of the compulsory compensation scheme, *viz.*, the automatic compensation of injured workmen without litigation. But it will be observed that even under the act of 1910, if that act had been held constitutional, it would have been possible for the employer in any case to insist upon a trial of the question whether or not the injury was caused in whole or in part by the "serious or wilful misconduct of the workman," in which case by the terms of the act the employer was not responsible. Practically, however, there would have been but few cases in which the employer could have hoped to escape under that provision; and the same would doubtless be true under a law in the form here proposed.

If these premises are sound, it seems to follow that while, in New York at least, there may, in the absence of a constitutional amendment, be no compulsory compensation without fault on the part of the employer, practical compulsory compensation without litigation in the vast majority of cases is still possible by legislative action without a constitutional amendment.

Obligatory Industrial Insurance

BY JAMES HARRINGTON BOYD

Chairman of the Employers' Liability Commission of Ohio

[A discussion of the legal principles involved in the enactment and the putting into operation of a plan of Obligatory Industrial Insurance as a remedy for the economic insecurity of workingmen which accompanies the modern wage system.]

THERE are two fundamental propositions involved in the enactment of obligatory industrial insurance laws by a state to compensate workmen and their dependents for injuries received and death occurring in the due course of their employment without regard to the fault or negligence of the workingmen, excepting wilful or malicious fault.

(1) Economic facts have been established during the last twenty-five years, in particular by German statistics, that the cause of from 50 to 55 per cent. of the accidents to workingmen injured or killed in the due course of their employment are due to the natural hazard of the business, *i. e.*, to the inevitable risk of the business plus the combined negligence of the employer and employee; that not to exceed 18 to 20 per cent of the causes of such accidents are due to the negligence of the employer, and that not to exceed 25 to 30 per cent of the causes of such accidents are attributable to the negligence of the workingmen; therefore the present common-law action based upon the fault of the employer only presumes in theory to furnish compensation of any kind in less than 20 per cent of the cases, while in fact on the average in the United States compensation is paid in any amount in less than 12 per cent of the cases. Hence from a social and an economic point of view, the common-law action based upon the fault of the employer is a failure as a means of furnishing workingmen compensation.*

(2) Under the existing conditions and law, is a plan of obligatory industrial insurance, which provides a fund administered by the state, created by infinitesimal payments contributed both by the employer and employee, to furnish compensation to be paid from the fund in lieu of all rights and remedies heretofore existing with respect to any injury received by said workingmen in the due course of his employment, within the legislative powers of the state?

(3) Is legislation of this character within the legislative power of any state or that of the several states, and, granting that it is, what are the limitations of such legislative powers in order that the enactment of such laws by the several states may not contravene the constitutional limitations of the Constitution of the United States?

The Police Power.

(4) Assuming now that the conclusions of facts, as set forth in proposition (1) are true, beyond controversy, it remains further to show: First, that under our dual form of government, it is within the legislative power of the several states to enact proper police measures, to regulate employments in which workmen are injured, and to protect the workmen, their dependents, and society from the evil effects of such injuries.

The Supreme Court of the United States has perhaps most clearly defined the conditions under which the conduct of business or employments warrants the exercise of legislative power of any state to pass proper police measures to regulate the same for the purpose of protecting society as a whole, in speaking through its Chief Justice (Waite), in Munn v. Illinois, 94 U. S. 113–154, 24 L. ed. 77–94.

In this case the constitutionality of a law passed by the legislature of Illinois to regulate the rates which grain elevators might charge was raised. This act fixed a maximum rate which grain elevators might charge the public for storing grain. These principles are clearly stated as follows: "The state is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

"From this source come the police powers, which, as said by Chief Justice Taney in the License Cases, 5 How. 583, 12 L. ed. 291, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first

*Report of Employers' Liability Commission of Ohio, Part I, pp. XXV. to Annals of the American Academy of Political & Social Science, July, 1911. LXXV.

colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects, and we think that it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the 5th Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate . . . the rates of wharfage at private wharves . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread,' 3 Stat. at L. 587, Chap. 104, § 7; and in 1848, 'to make all necessary regulations respecting hackney carriages, and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers.' 9 Stat. at L. 224, Chap. 42, § 2.

From this it is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statistics regulating the use, or even the price of use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation. . . .

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. . . .

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

It follows from the definition foregoing, that the existing conditions relative to the effects of personal injuries which workmen receive in the due course of their employment, upon their dependents and society as a whole, as set forth in proposition (1), come within the domain of applicability of the police power of the state.

Second. That the remedy provided in proposition (2), namely, obligatory industrial insurance, is not in conflict with the constitutional limitations of the several state or Federal Constitutions.

The Proposed Remedies.

The remedy, obligatory industrial insurance, provides as follows:

(1) That all workmen injured shall be compensated at the rate of 66⅔ per cent of his loss of wages for not longer than 300 weeks, and not more than $12 per week; in case of death where there are dependents, the compensation shall not be less than $1,500 nor exceed $3,400, plus doctor bills and funeral expenses to a maximum amount of $150; and in no case shall the compensation for any injury exceed $3,400.

(2) That any employer of five or more persons shall pay monthly into the state fund, the premium based upon the pay roll and hazard of his business, sufficient to pay his *pro rata* share of the compensations awarded to workmen against the fund.

(3) That every employer of five or more persons who fails to pay said premiums shall not avail himself of any of the so-called common-law defenses in case he is sued by a workman who is injured while in his employ.

(4) That every workman is obliged to accept the compensation provided by the act, in lieu of all rights and remedies heretofore existing, excepting the cases where he may be denied any relief whatever, or where he may be injured through a wilful act of the employer, or through the employer's violation of a statute or ordinance, in which case he may elect to sue his employer at law or take under the compensation act.

(5) That in case a workman, covered by the act, is totally disabled he shall be compensated at the rate of 66⅔ per cent of his average weekly wage, in no case at less than $5 per week, nor at more than $12 per week, and the compensation shall be paid as long as total disability lasts.

Constitutionality of Industrial Insurance Legislation.

In the application of the foregoing remedies are the following constitutional limitatons infringed:

(1) The taking of property without due process of law.

(2) No law impairing the obligation of a contract shall ever be passed.

(3) All persons having the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

(4) The taking of private property for private use.

(5) The taking of private property for public use.

That the foregoing constitutional limitations are safely guarded by the rule laid down in our jurisprudence by the Supreme Court of the United States and likewise in the state courts was on the 3d of January, 1911, voiced by the Supreme Court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. —, 31 Sup. Ct. Rep. 299; Shallenburger, Governor of Nebraska, et al. v. Barton, et al.; Assaria State Bank of Assaria et al. v. Dolley, et al.

Mr. Justice Holmes, delivering the opinion of the court in the case first cited, said:

"This is a proceeding against the governor of the state of Oklahoma and other officials, who constitute the State Banking Board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17th, 1907. This act creates the board and directs it to levy on every bank existing under the laws of the state an assessment of 1 per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required), the amount needed to make up the deficiency. . . . In answering that question we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain *criteria* of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Danby Bank v. State Treasurer, 39 Vt. 92, 98,) still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. *In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Bacon v. Walker, 204 U. S. 311, 315, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 289. And in the next, it would seem that there may be other cases besides the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Minn. Rep. 466. At least if we have a case within the reasonable exercise of the police power, as above explained, no more need be said.*

"It may be said in a general way that the police power in a general way extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort, probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. The power to compel beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633. So far is that from being the case

that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Danby Bank v. State Treasurer, 39 Vt. 92; People v. Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux v. Young, 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606."

Assuming now that it is within the police power of the states to enact remedial laws for the purpose of creating compulsory state insurance for workingmen there arise two questions:

(1) In order to make effective and practical an industrial insurance law, what provisions must be enacted, not only for the purpose of avoiding constitutional difficulties, but that the executive and judicial functions of the state may not be confounded. It is of the highest importance on the ground of expediency that these provisions shall take, as far as possible, the form of administrative measures rather than those of a judicial nature. In the administration of an industrial insurance act, it is necessary to put into operation those summary methods of procedure in so far as they are in harmony with justice which is economical. At the same time, it is necessary to use as little as possible those judicial methods which experience has shown result in such great economic waste in the adjudication of personal injury suits.

In the second place: If the final determination of a controversy arising under an industrial insurance act must be by means of a trial by jury, then the much hoped for saving in economy would be lost.

The 7th Amendment of the Constitution of the United States reads as follows: "In suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It follows, therefore, from the 7th Amendment, that in case a controversy arising out of an industrial insurance act can be classified as an executive function of the state, then the 7th Amendment has no application, for the reason that it is limited in its application by its express provisions to judicial proceedings. Our inquiry, therefore, resolves itself into two propositions:

Proposition 1. Does the exercise of any legislative act created for the purpose of appropriating the property of the employer (and employee), for the purpose of compulsory industrial insurance and determining the rights of the employee, come within the exercise of the executive function or within the judicial function of the state?

Proposition 2. If it comes within the judicial function, does it fall within that class of actions which receive a trial by jury?

Executive or Judicial Function.

Proposition 1. In considering this proposition, it is necessary to investigate the nature of the limitations created by the 5th Amendment to the Constitution of the United States, with respect to the provision "due process of law," which is deemed to apply not only to the power of the legislative, but also to the judicial, branches of the state government.

The 5th Amendment reads: "No person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The phrase "due process of law" has application in our problem, not only to the rights created by the act, but also rather to the remedy provided by the act to make the putting into operation of the same effective.

The executive arm of every state government disposes of many problems which, considered by themselves, are purely judicial in character. This principle, as the authorities show, is illustrated in the following examples, *viz.*: (1) In the levying of special assessments; (2) in the exercise of the power of eminent domain; (3) in the collection of various taxes; (4) in the adjudication of those controversies (of purely judicial nature) which deal with questions of account between tax collectors and the state, in which the state may finally determine all issues through its administrative agencies. In Den. ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372, Justice Curtis, after referring to the summary methods used in England in the collection of taxes and in adjusting accounts of receivers of revenue, quotes from laws in United States providing for the issuing of warrants against tax collectors who have been remiss. Speaking, then, of due process of law he says: "For though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 15 N. C. (4 Dev. L.) 15, 25 Am. Dec. 677; Taylor v. Porter, 4 Hill, 146, 40 Am. Dec. 274; Vanzant v. Waddel, 2 Yerg. 260; Bank of State v. Cooper, 2 Yerg. 599, 24 Am. Dec. 517; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Greene v. Briggs, 1 Curt. C. C. 311, Fed. Cas. No. 5,764), yet this is not universally true. There may be, and we must have seen that there are, cases, as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question whether those provisions of the Constitution which relate to the judicial power are incompatible with those proceedings.

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted, so are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat, 19, 6 L. ed.

537), or a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matter under the judicial power, that they involve the exercise of judgment upon law and fact."

"The court holds that the legislative power covers the disbursement of tax funds as well as the collection of the same, saying: 'The power to collect and disburse revenue and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.'"

Cooley, speaking of trial by jury in eminent domain cases, in his Constitutional Limitations, page 778, cites the case of Re New York C. R. Co. 66 N. Y. 407, and quotes from the decision as follows: "The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application of the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax, or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use. It follows from these views that it is not necessary for the legislature, in the exercise of the right of eminent domain, either directly or indirectly through public officers or agents, to invest the proceedings with the forms of substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power is given of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of property and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature in its discretion prescribes."

In respect to the levying and collection of taxes in a summary manner, the court says in Kelly v. Pittsburgh, 104 U. S. 80, 26 L. ed. 659: "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government the nature of the duty of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law."

In McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335, the court stated:

"The mode of assessing taxes in the states, by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary or inequal or illegal. It must, under our Constitution, be lawfully done.

But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation."

In Palmer v. McMahon, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324, the court said: "That Amendment (the 14th) provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws. It is insisted that Palmer had no notice and no opportunity to be heard or to confront or cross-examine the witnesses for the taxing authorities or to subpœna witnesses in his own behalf; and had not otherwise the protection afforded in a judicial trial upon the merits. The phrase "due process of law" does necessarily mean a judicial proceeding. The nation from whom we inherit the phrase "due process of law," said this court, speaking by Mr. Justice Miller, "has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." McMillen v. Anderson, 95 U. S. 37, 41, 24 L. ed. 335, 336.

The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Watson v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. The imposition of taxes is in its nature administrative, and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be and is given under all systems of taxation according to value.

It is enough, however, if the law provides for a board of revision authorized to hear com-

plaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663."

"These decisions show that controversies arising under the subject of taxation and eminent domain have no relation to judicial proceeding, and in consequence due process of law does require in such instances, proceedings in a court of law, unless the government consent." (Robert J. Carey's Brief on the Power of Congress in Respect of Industrial Insurance, p. 132.)

Trial by Jury.

Proposition 2. Mr. Robert J. Carey in his Brief, p. 137, has well summarized the principles involved in this proposition, referring to the decisions of the court in Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493.

"But be this as it may, we still think these decisions would not require trial by jury for the purpose of adjudicating a claim made by an employee against a government agency, for the payment out of a tax fund of a stipulated sum alleged to be due such employee as insurance. Such right so vested in the employee is not a new private right against his employer. Thus it bears no resemblance to new substantive private rights akin to common-law rights, though created by statute. It is rather a right to share in a tax fund, and thus is necessarily a claim against the government, though the details of the law might be such that the claim is to be made against a government agency, as, for instance, a bureau, commission, or association. The fund against which such claim is made is collected admittedly in a summary proceeding; the right to an interest in such fund arises not for the purpose of recoupment in damages on account of a private wrong done the employee, but solely because the employee, being a victim of a prevalent evil, is to be protected by the state as a member of a class of society. The right, indeed, is in one respect akin to the right of a landowner in an eminent domain suit to compensation due him in lieu of his property appropriated. In the present instance the employee's chose in action against his employer for a personal wrong suffered is taken from him, and in lieu of which he is paid a benefit for the appropriation of such right. Under such circumstances, even though a controversy arising over the payment of a fund take a judicial form, we think it within the power of the government to determine the character of the remedy. The following cases are in point: McElrath v. United States, 102 U. S. 426, 26 L. ed. 189; Guthrie Nat. Bank v. Guthrie, 173 U. S. 534, 43 L. ed. 798, 19 Sup. Ct. Rep. 513.

[*To be continued next month.*]

The basic question is who shall bear the burden of inevitable accident? When a servant engaged in extra hazardous employments loses life or limb in the line of his duty, the burden consequent on his death or injury ought to be laid on the service that he quits. Any other rule is illogical and contrary to public policy, inhuman, and cruel.—Daniel Fraser.

The Commercial Lawyer

Ed. Note—The following article, prepared especially for Case and Comment by an attorney and authur of note, whose work has previously appeared in our pages, was suggested by the convention of Commercial Lawyers of the country recently held at Atlantic City, and points out the qualifications necessary to success in commercial law work, and the desirability of acquiring that class of practice.

ANGRY Creditor:—"Mr. Webster, the bank protested the check you gave me!"

Daniel, the Great:—(rubbing his forehead absently)—"Well, sir, you see, I've been checking and checking all day, and I guess there wasn't any more left."

In other words, the ablest practitioner America has produced lacked the first requisite to success as a "commercial lawyer."

Such a lawyer is, in fact, a new type, developed in the course of the last twenty-five years, under stress of modern conditions,—and he has come to stay. His prosperity is so evident that attorneys who have paid little attention to this branch of legal practice are beginning to "sit up and take notice." Perhaps some are a little envious,—more, probably, are wondering whether it wouldn't be advisable to extend their own business in that direction.

Is it feasible to combine this feature with the incidents of a "general practice?" Is it possible to be a "commercial lawyer," and not cease to be any other kind of a lawyer? Is the time coming when every attorney must study the means and methods of this branch of his profession, or go out of business?

These, and many similar questions, the average general practitioner would like to ask of the delegates who attended the convention of the Commercial Law League of America, held at Atlantic City, July 18th to 23d. The league has 2,500 members in all parts of the country, and upwards of 600 attended, for the primary purpose of meeting personally men with whom they have had business dealings by correspondence.

The absence of the personal equation is the chief difficulty inherent in this class of business. For generations the American attorney, like his English cousin, from the days of the year books, has relied for his success upon his personal standing in his own community. His reputation among his neighbors, based upon his ability, his probity, his "magnetism," his learning, his ready wit, even his foibles of mind and temper,—all these have formed part and parcel of his stock in trade. The practice he has thereby acquired is wholly personal. It cannot be bought or sold. It dies with him, and yet, because of this very quality of being a personal appendage, it is all the more precious in his esteem.

Suddenly the man who has, by years of industry, built up this sort of a practice, who is conscious that his reputation has extended beyond the limits of his own city, perhaps beyond the confines of his own state, wakes up to discover that important business, lucrative business, from out of town is being monopolized by some young fellow who, perhaps, studied law in his office, or by some comparative stranger in the community who, while able and honest, is more or less of a "plodder,"—who isn't in the least degree a "mixer," who has no taste for politics, no quickness of wit, eloquence, "presence," or even aptness at *repartee*.

At the outset the general practitioner was prone to say with shrug of shoulder, "Oh, he isn't a lawyer—he's a collector,"—but the young man thus summarily dismissed manages to get hold of important lawsuits and prosecute them successfully; he is always trustee or attorney for the trustee in bankruptcy proceedings, and clients who have done business with the older attorney for years begin to wander into the office of his younger competitor, at first, of course, with claims that must be sent out of the city for collection.

The younger man's business is country-wide. He can reach the rascally executor in the South, the dishonest factor in the West, the unprincipled correspondent in the East, and take care of the litigated estate in Texas and the will contest in Oregon.

Well, what is the older attorney to do about it? How is the younger competitor to bring about these results? The answer, "There are always the attorneys' lists," is hardly satisfactory. Every attorney has been asked to go into one or more of them. In a general way he knows that some of them are a good thing,—and that others are the worst kind of "fakes." It is usually the latter that present themselves most persistently. Good things seldom knock at the office door, hat in hand, and obsequiously ask to be appropriated,—and yet that is just what the average lawyer waits for.

These attorneys' lists, of which there are over 200, deserve careful study and the individual attention and discretion of the attorney who has made up his mind to be included in some of them. They group themselves under three general classes, though there are all sorts of "cross breeds." First, there are the lists that are more generally circulated among merchants and forwarding agencies; second, there are lists which are merely a combination of attorneys in different places who agree to interchange their forwarding business; and, third, there are lists of lawyers whose business is not strictly commercial. An examination of these latter will generally show, however, that the commercial lawyer who has studied the art of acquiring out-of-town business has usually managed to get a prominent place in the best general lists.

The expense of being included in one of these lists varies from nothing to $200, the cost being regulated quite as much by the size and location of the subscribers' city as by the importance of the list itself. An attorney may easily spend a large sum of money in this sort of advertising without substantial return if he plunges recklessly into the vortex of schemes that await him on the threshold of his career as a commercial lawyer.

An attorney in a small or remote community can usually get his name into a number of important lists at small expense, and such lawyers might profitably pay closer attention to the development of this side of their practice. Many have learned by experience, however, that a commercial practice cannot be increased as an incident to general business without time, patience, and close attention. It has even happened that good general practitioners have got into trouble through negligent handling of forwarded claims.

Most of the standard lists bond or guarantee their attorneys, and have well-organized grievance departments whose activities are called into play quite as frequently from carelessness as through misfeasance. On the other hand, of course, it is the gravity of the charge, rather than the amount involved, that requires the most strenuous interest of the grievance department.

An anecdote of this incident of commercial practice may be in point. A young attorney in a small western town failed to remit a collection of $200. The agent of the list in question made a long journey and called upon the young man, talked with him for several hours, and got his confidence. The lawyer frankly acknowledged that he had received the money some weeks previously. "Interest rates are high out here," he explained, glibly. "Jones & Brown, with whom I studied law, and one of our largest and best firms, always hold back their collections a month or so and get the interest,—see?"

"You'll borrow that $200 and pay us to-morrow morning," said the list agent.

"Who'll lend it to me?"

"Jones & Brown."

"They aren't in that business. You don't know them."

"They will this time. Just tell them about what you've told me, and they'll go your note."

Jones & Brown indorsed the young man's note the following morning as predicted. It made little difference whether he'd lied about their methods of doing business or told the truth. The young man who had studied law with them wasn't adapted to a commercial practice.

While it is a simple matter to get into a list of some sort, a place in one of the

more important standard books is a commercial asset, especially in a city of any size. Vacancies are watched with eager eyes, and competition is keen. The business judgment and acumen required throughout the career of the commercial lawyer is nowhere more essential than at the very threshold. How to get business isn't taught in the law schools, nor in any other curriculum than the school of life. Of course a list which is widely circulated among clients, trade agencies, and wholesalers from whom the business is forwarded direct, may prove a very remunerative investment.

The collection fees are standardized,—10 per cent on $300, 7½ on a thousand, and so grading down to 5 and 2 per cent on larger sums. Of this one third goes to the forwarder and two-thirds to the receiving attorney.

Of the many fake schemes which the commercial lawyer has to meet and detect none is more frequent than the "sole agent" list. The solicitor makes a contract that the subscriber shall be the "sole agent" of the list in his vicinity. The lawyer gets a list in which he so appears and pays his money. Later he discovers that the list is published in several editions. That his competitors in the locality all have lists in which they respectively appear as the "sole representative," and that the circulation of the list is confined to the "suckers." It would be impossible to make a census of the attorneys who have been taken in like this, for naturally they don't wail about it on the street corners. It is human nature to pocket the loss, keep very silent, and do a lot of thinking.

The commercial attorney who has solved the various problems that are incident to this branch of the profession, and has established a large correspondence business, is possessed of a practice which differs from that of all others in its permanency. He can lose it, to be sure, by persistent neglect, but given any ordinary degree of ability and industry, and he has a good will which is transferable to his son, his partner, or which may even be sold for a substantial sum to a new comer. English physicians buy and sell a practice, but in this country almost the only professional good will which has this saleable quality is that of the commercial lawyer.

And yet, in the last analysis, it is always "the man behind the gun" in commercial law, as in every other walk in life. The necessity of knowing the man to whom you are intrusting important interests a thousand miles away has given birth to the commercial law league, whose recent convention has served to attract the attention of the bar generally to this line of work.

J. Howard Reber, of Philadelphia, was elected president for the ensuing year, John C. Landis, of St. Joseph, Missouri, vice president, and Frederick P. Vose, of Chicago, recording secretary.

The retiring president, Mr. A. V. Cannon, was toastmaster at the annual banquet, and there were speeches by T. Moultrie Mordicai, of Charleston, South Carolina, on "The Bar, the Mother of the Judiciary," by Albert Moise, of Philadelphia, on "Echoes from the South," and by Wm. B. Paddock, of Ft. Worth, Texas, on "Commercial Necessities."

The business session opened with the annual address by Henry C. Niles, of York, Pennsylvania, on "Progressive Law," which was followed by speeches by Isadore Fiebelman, of Indianapolis, Indiana, on "The Law and the Profits;" A. R. McMaster, of Montreal, on "Insolvency Law of Quebec;" Edmund C. Bennett, of Denver, Colorado, on "Regulation of Corporations;" Malcolm Sundenheimer, of New York, on "Uniform Bills of Lading;" Lee Joslyn, of Detroit, on "Is the Bankruptcy Law Permanent?"

There was a discussion as to "What the League should Do for its Members?" led by C. F. Pattison, of Cleveland; James R. Duffin, of Louisville; E. M. Sheldon, of Buffalo; and James L. Garvin, of Indianapolis. "What the Members can Do for the League" was discussed by C. Howard Milliken, of Baltimore; John Mosier, of Muskogee, Oklahoma; C. C. Moser, of Portland, Oregon; Charles N. Orr, St. Paul, Minnesota, and George V. Phipps, of Boston. The scheduled program in order, consisted of an address by E. C. Ferguson, of Chicago, on "The Past and Future of the Commercial Law League of

America;" "The Relation between the Forwarding and Receiving Attorney," by J. Zach. Spearing, of New Orleans; "Pennsylvania Law Alliances," by John F. Kell, York, Pennsylvania; "More Trouble, Who's to Blame and How to Help," by W. M. Crook, of Beaumont, Texas; "Lawyers in Legislative Halls," by Frank Kenna, of New Haven; "Ethics of Commercial Practice," by B. S. Oppenheimer, of Cincinnati, and "Some Exceptions to Uniform Rates," by Willard P. Smith, of San Francisco.

In the course of his address Mr. Joslyn made an interesting comparison of the cost of insolvency proceedings in state courts and under the bankruptcy act, from which the following is an excerpt:

"(a) Bankruptcy cases are closed in much less time and the proceeds distributed to creditors more expeditiously.

"(b) Attorneys' fees are about the same, with a tendency to be somewhat larger in bankruptcy cases. The increase, however, is shown by comparisons with the present charges in bankruptcy as compared with charges and allowances in the state courts prior to the present bankruptcy act. The difference is one growing out of the increased charges now made as compared with fifteen or more years ago.

"(c) Trustee, receivers, and assignees in the state courts are allowed much larger sums than under the bankruptcy law, and the clerical services, printing, and miscellaneous expenses are far higher in the state courts.

"(d) Dividends paid in bankruptcy cases are fully as large as in state court insolvency cases, and are paid much more promptly.

"(e) The contesting and determining of disputed and unliquidated claims is much more difficult, long drawn out, and exceed by far in expense, in the state as compared with the bankruptcy courts."

In the course of his discussion of the ethics of commercial law, Mr. Oppenheimer said:

"Then if the so-called commercial lawyer is a necessary product of the times, there is no reason for supposing that his mode of practice is necessarily less ethical than that of any other member of the profession. Indeed, if we are correct in saying that business itself is being rapidly made more ethical—if the world, despite its progressive commercialization, is really growing better, and if civilization is spreading, then those lawyers whose services are largely devoted to the adjustment and maintenance of the proper commercial relationships must inevitably get in line with the *Zeitgeist,*—with what Maeterlinck has expressively called 'The Spirit of the Hive.' The mere fact that the commercial practitioner may ofttimes represent clients at a distance, or be called upon to interpret the bankruptcy law, or assist unfortunate debtors in effecting an extension of credit, does not mean that he must be less ethical, less honorable, or less trustworthy than his brother who receives large annual retainers for enabling corporations to dodge the tax inquisitor."

These are but "tit-bits,"—a detailed report of the convention would be impracticable and aside from the purpose.

The committee on lists and agencies made an important report. Of 218 such lists and agencies it has sifted out some sixty odd which deserve serious consideration from commercial lawyers.

As Mr. Oppenheimer pointed out, commercial law differs from other practice in the fact that advertising is ethical, because it is essential. The man who wishes to get business from localities where he cannot be known personally must adopt the methods of the merchant. Once granting that he may,—must advertise, the only question is where he shall stop, and that must be regulated solely by expediency. This innovation is a necessary concomitant of the growth of business to country-wide and even world-wide proportions.

It is useless to inquire: "Is the law still a profession?" or bewail the "degeneracy of the times." The latter have changed and law business must change with them. To what extent he shall conform to such changes must always depend upon the judgment, tastes, and abilities of the individual attorney. It is for him to decide whether it is worth while to endeavor acquiring out of town business.

Of course it is a good thing to get business. Of course "business brings business;" and small business must be

carefully attended to if one wants big business. All this is just as true of commercial practice as of any other.

In a general way it may be said that "commercial lawyers" in the larger cities are inclined to specialize, though they are often retained in important general litigations through their correspondents. Their offices must necessarily be organized to take care of much small business, and their time is often monopolized by petty details, perhaps narrowing their view and disqualifying them for other kinds of work.

The average young lawyer, fresh from his academic studies, seldom knows much about the most ordinary incidents of trade and commerce. He has doubtless borrowed money, and therefore has some personal experience with "promissory notes." He may even have been notified of an overdraft by his banker, but that is the only kind of a draft he has dealt with.

Nor will his activities, in the ordinary run of general practice, serve much to enlighten him on questions that arise in interstate commerce. He has doubtless taken a course in "carriers," and has puzzled his brain over the intricacies of "stoppage *in transitu*," but it may be years before any instance arises where this learning will be called into play.

Of course when the time does come, he will have his "L.R.A." at his elbow, and can refresh his recollection from a complete note on the subject. But will his client consult him or go to the "commercial lawyer?"

All this is but a part of the ever recurring question: "How far is a general practice possible under modern conditions? The great majority of attorneys are still general practitioners, turning from wills to patents, from the client whose son is in trouble with the police to one who has a line fence dispute with his neighbor, from the one who has inflicted injuries through the careless handling of his automobile to the client who wants to form a corporation, and from all these to the man with a claim for $10 to collect.

But the general practitioner may discover that a trust company has been consulted about the will and a patent attorney about the patent, that a criminal lawyer is looking after his client's son and a real estate attorney settling the line fence dispute, that the insurance company's attorney is defending the automobilist, a bank attorney forming the corporation, and that the man with the $10 claim to collect has put it into the hands of the commercial lawyer.

And yet the fact remains that the general practitioner still manages to exist and to do business at the old stand;—for, when all is said and done, and due allowance made for important and increasing exceptions, the great majority of clients still come to a man from his own vicinity because he is what he is, a tower of strength to the men about him unlearned in the law, who know him, and like him, and trust him in their most important concerns and most intimate and confidential affairs.

The time is not far distant when every state of this Union will have upon its statute book a workingmen's compensation act, which will entitle an injured workman to compensation, irrespective of the negligence of a fellow servant, irrespective of the doctrine of assumption of risk, and irrespective of the doctrine of contributory negligence.—Maurice L. Alden before Kansas Bar Association.

Editorial Comment

Current Thought on Workmen's Compensation

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Edited by Asa W. Russell.

Workmen's Compensation Acts

THE annual convention of the National Manufacturer's Association considered various interesting phases of the proposed Workmen's Compensation system. From the report of the proceedings of that convention, written by Mr. Kellogg Durland for the Boston Transcript, it appears that the following subjects were discussed:

Prevention of Accidents.

The fearful toll in loss of life and limb paid annually by the industrial army of the United States is tremendous. The six bloodiest battles of the Civil War—Gettysburg, Spottsylvania, the Wilderness, Antietam, Chancellorsville and Chickamauga—claimed in killed, wounded, and missing, all told, 105,000 men. Yet the number killed and injured upon our railroads alone during one recent year was 108,324. During our two most recent wars, the war with Spain and in the Philippines, the aggregate loss of killed and wounded was less than 6,000 men, while the number of killed and wounded in the industrial fields of the country during the same period, according to lowest estimates, was more than 5,000,000. In other words, for every man killed or wounded in the war no fewer than 875 were killed or wounded in our industrial world. In the light of these figures and startling comparisons we can well take profit from Germany's example, and set about at once giving time and place to accident prevention. To revert to the cold-blooded business side of this question, the cost of the casualties suffered by our industrial army in the last ten years reaches a sum great enough to have carried on two such wars at the same time as our own Civil War and the Russian-Japanese War.

Particular stress is most properly being made upon the work of accident prevention. We are now passing out of the age of cure. We are getting down to basic principles in all spheres of life, in attempting to minimize the possibilities of things happening. The new chair of preventive medicine at Harvard Medical School is symptomatic. We have begun a systematic agitation of the American people tending to teach the theories and practices of fire prevention, and the work of accident prevention is a complementary step in the same direction.

Governments throughout Europe have long since established museums of safety, institutions of accident prevention, permanent expositions, and working exhibits of safety appliances for industries,

our industrial life any universally ac- sums of money to families who have

and on the farm, as a factor in the general education of the people. When we approach subjects of this kind we begin to realize how much truth there is in the criticisms made in Europe of the educational system of the United States. Matters of the utmost importance are not only not a part of our educational system but they are scarcely even talked of, save among the most progressive educationalists and reformers, who are generally termed cranks. While we pride ourselves on being a practical people we are in many respects the most impractical of modern nations. We have just begun vocational education. We are neglectful of the duties of the state towards its citizens, we are negligent and superficial where we should be most careful, and our point of view is susceptible to wide expansion and increased perspective. Germany has long since established a systematic education for employers and workers, through which popular sentiment is formally developed and the discussion of these questions encouraged.

That this form of education is of an eminently practical character may be indicated by the fact that safety devices do not necessarily mean large expenditure, or complicated machinery. Rubber tips, or sharp points, attached to the bottom of ladders may often prevent more accidents than costly guards or intricate machines. Simple but effective danger signs often result in tremendous good. Electric warnings that can be read at a glance, perhaps in several languages, or in symbolic form so as to be understandable to the illiterate, all of these things we should know about and adopt as part and parcel of our daily industrial life. Manufacturers in this country are beginning to realize that preventive measures of this character are good business and in the long run save much money. They are economical as well as humane.

Protection of Farm Workers.

While more than 33 per cent of the wage earners of America are farmers or farm workers, yet our present system of liability, save in exceptional instances, makes no provision for injured or maimed farm workers. The ideal system of workmen's compensation ought to safeguard the greatest number of human beings and to compensate the greatest number of injured workers. Hence, it is beyond dispute that any system which excludes 33 per cent of all injured workers is far from ideal. The hazards of farming are not always appreciated in this country, and it is a matter of noteworthy significance that the manufacturers appreciating the hazards of this occupation are about to take steps for the inauguration of a wage workers' compensation which includes farm workers. Perhaps no industry or occupation in this country offers the same variety of perils as farming. A farm worker has to concern himself with various exposed machines, he from time to time is called upon to handle explosives, he is menaced by dangerous animals, kicking horses, vicious bulls, etc., he is exposed to dangers of the axe and the saw and the usual perils which accompany tree felling and logging; in fact, a farm worker is exposed to the perils incident to half a dozen trades and industries.

Unpreventable Accidents.

There are a certain number of unpreventable accidents, and according to the recommendations of the association, compensation for accidents of this character should come from a fund jointly supported by employer and employee. The employer's responsibility should cover approximately that part which is due to his fault and to the inherent hazard of the industry, and the employee's covering approximately that part which arises from his fault. It is recommended that every injury received in the course of work should be compensated save those due to criminal carelessness, or to drunkenness on the part of the injured worker.

Prompt Medical Aid.

Practically all authorities agree that immediate attention to injuries not only saves suffering, but many lives and limbs and enormous sums of money. This principle has been demonstrated and recognized even in the United States by progressive employers and by insurance companies, but there is still lacking in

our industrial life any universally accepted system for insuring immediate aid to the injured. Under the German laws every injured worker is taken care of automatically and immediately after the occurrence of an accident, and his dependents also automatically receive attention.

The "Doctor Question."

The so-called "doctor question," as it is widely known in Europe, is a most important one in connection with workingmen's accident compensation. At a recent international conference held at The Hague, nearly three-quarters of the time was devoted to this one question. There are many advocates of a system of selection whereby the doctors are chosen by the insurer, who is usually the employer, but there are also advocates of the system of selection whereby the injured workman picks his own doctor. On the whole, experience is adverse to this latter system, because of the opportunity it admits for collusion between an unscrupulous workman and an equally unscrupulous physician. Furthermore, it is always desirable that the medical service be of the highest possible character. Surgeons must be men of considerable experience in order to be of the highest service in this kind of work.

Lump Sum Payments.

One of the questions which invariably comes up for discussion in regard to workingmen's compensation is that known as lump sum payments. Is it wise to give to a workman a considerable sum of money, or is it better to give him a weekly allowance pending his convalescence? German experts seem to be almost unanimously of the opinion that it is a mistaken policy to intrust large sums of money to families who have been accustomed only to the handling of weekly wages. It may, therefore, be asserted that the pension system is the only universally practical system.

Administration of Fund.

It is further laid down that compensation must be efficient. That is to say, not less than 75 cents, and preferably 90 cents, out of every dollar paid into the insurance fund should actually go to the injured worker or his or her dependents. To this end all expenses in connection with the insurance fund and its administration must be reduced to the minimum. At the present time only about 30 per cent of the money paid by way of compensation to injured workers in the United States actually reaches the avowed beneficiary. That there is a great deficiency in our system is obvious from the fact that in Germany from 70 to 80 per cent of every dollar reaches its true destination.

It has been figured in Germany that 68 per cent of the regular annual wage of a workman is a fair rate of compensation as the equivalent for complete disability. It is estimated that the ordinary lay-offs in the course of a year, with expenditures for tools, working clothes, car-fares, etc., during the working year aggregate about one third of the worker's annual wage.

The conclusion reached in Germany resulting in the establishment of the theory which is now generally accepted, that the only way whereby compensation may always be certain to injured workers, without regard to the financial responsibility of the employers, is by the establishment of a systematic and automatic insurance fund which immediately becomes available without recourse to processes of law.

Among the New Decisions

A precedent is but authenticated custom. It is like the coin of the realm. It bears the public stamp which evidences its genuineness.

—James C. Carter.

Alteration of note — change of printed figures — effect. It may be laid down as a general rule of law, established by the overwhelming weight of authority, that a change in the date of a note, made after its execution and delivery, whether from an earlier to a later date or *vice versa,* is a material alteration, destroying the validity of the note in the hands of one responsible for the change, as to a party thereto, who has not consented to the change.

The general rule has been relaxed in some cases to permit recovery on notes the dates of which have been altered for the purpose of correcting mistakes, or of making them conform to the agreement of the parties, but even under such circumstances, according to some of the authorities, the alteration is a material one and avoids the note if done without the knowledge or consent of the party sought to be charged thereon.

The case of Lombardo v. Lombardini, 57 Wash. 352, 106 Pac. 907, annotated in 32 L.R.A.(N.S.) 515, holds that an alteration of the printed figures forming part of the date of a note written on a printed blank, so as to make them correspond with the figures written in ink in the body of the note, is not so material as to avoid the note.

Attachment — alimony — permissibility. That alimony cannot either before or after payment thereof be subjected to the payment of debts of the wife which existed prior to the allowance thereof is held in the Ohio case of Fickel v. Granger, — Ohio St. —, 93 N. E. 527, which is accompanied in 32 L.R.A. (N.S.) 270, by a note collating the cases dealing with the liability of alimony for debts.

Attachment — discharge — bond — liability of obligor. The following general rules may be laid down concerning the right of obligors in bonds for the release of attachments to attack the attachment: Where the bond contains a provision by which the obligors undertake to pay the judgment recovered in the attachment suit, they are held to be precluded by their undertaking from attacking the validity of the attachment proceedings in an action on the bond. And even where the bond contains no express provision to pay the judgment, but has the effect of discharging and releasing the attachment, it has been repeatedly but not uniformly held in actions on the bonds that the obligors are precluded from attacking the validity of the attachment. Where the bond given does not have the effect of discharging the attachment, the defendant has been allowed to attack the validity of the attachment. Where it appears that the attachment proceedings are void, an exception to the general rules precluding an attack on the validity of the attachment is recognized, and it is held that the validity of the attachment may be attacked, both by the defendant and his sureties.

This question was presented in the case of Moffitt v. Garrett, 23 Okla. 398, 100 Pac. 533, annotated in 32 L.R.A. (N.S.) 401, holding that an obligor on a bond to discharge an attachment, under the provisions of § 4404, Wilson's Rev. & Ann. Stat. (Okla.) 1903, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment.

Carrier — liability for calling white person negro. The liability of a carrier for insulting a passenger by declaring or intimating that he belongs in the colored compartment seems to have been definitely determined in but two cases. The latest of these is the Louisiana case of May v. Shreveport Traction Co. 127 La. 420, 53 So. 671, annotated in 32 L.R.A. (N.S.) 206, holding that to apply the term "negro" to a white person is humiliating and insulting; and a suggestive question, such as, "Don't you belong over there?" addressed to a white person by the conductor of a street car, who points to the seats reserved for negroes, is but little less so. In either case, and whether the language used be heard by others or not, an action in damages will lie against the carrier.

The earlier decision is Wolfe v. Georgia R. & Electric Co. 2 Ga. App. 499, 58 S. E. 899. It is cited in the May case, from which it differs in holding that if the conductor, in the exercise of his duties in enforcing the separation law, uses extraordinary diligence or extreme care and caution to prevent mistaking a white person for a negro, or *vice versa*, and such a mistake occurs notwithstanding such care, the carrier will not be liable, while the latter holds that the carrier and its servants must determine the question at their peril.

Corporation — holiday — adjournment. The well-considered California case of Cheney v. Canfield, 138 Pac. 342, 111 Pac. 92, 32 L.R.A.(N.S.) 16, holding that a statute providing that whenever any act of a secular nature is appointed by law or contract to be performed on a particular day which falls on a holiday, it may be performed on the next business day, does not justify the holding of a corporation meeting on such succeeding day when the day appointed by the by-laws falls on a holiday, and no provision is made for such contingency by the by-laws.

This decision appears to be one of first impression.

Fraud — purchase of city lot — misrepresentation of intended use. A false statement of present intention as to the use to which the lot should be put, made for the purpose of inducing the sale of a city lot, when the use to which the lot is actually to be put will greatly depreciate the value of the remaining property of the grantor, is held in Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670, such fraud as will justify cancelation of a deed made in reliance thereon.

The cases in which the principles governing the subject of future promises as a fraud have been applied concretely, where a rescission of a conveyance of real property has been sought upon the ground of false statement as to the use to which the property was to be put are collated in a note accompanying the Adams case in 32 L.R.A.(N.S.) 127. These cases as a whole sustain the foregoing decision.

Gift — return to donor — effect. After a gift has been completed by sufficient delivery and acceptance, the donee may loan the subject thereof to the donor, or give him, as well as any other person, the mere custody of it for any purpose, without affecting the gift. So, it is held in the Michigan case of Garrison v. Union Trust Co. — Mich. —, 129 N. W. 691, that a gift of a ring, completed by delivery and acceptance, is not affected by the fact that it is lent by the recipient to the donor, and retained in his possession until his death.

The considerable number of cases dealing with the effect of the retention or resumption of the possession of a gift by the donor are collated in the note which accompanies the Garrison case in 32 L.R.A.(N.S.) 219.

Injunction — wrongful issuance — liability of municipality. It is a well-settled rule of law that no right of action exists for damages sustained in consequence of an injunction erroneously issued, where no injunction bond or undertaking was given, and the injunction was not sued out maliciously and without probable cause. This rule is as applicable when a municipal corporation obtains the injunction as in other cases.

In the recent Idaho case of Doyle v. Sandpoint, 18 Idaho, 654, 112 Pac. 204, annotated in 32 L.R.A.(N.S.) 34, it was

held that under Idaho Rev. Codes, § 4291, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation.

Injunction — boycott. The important case of American Federation of Labor v. Buck's Stove & Range Co. 33 App. D. C. 83, holds that a boycott is a combination to harm one person by coercing others to harm him; that a labor union and its members may be enjoined from placing the name of a concern on its "Unfair" or "We Don't Patronize" list, if their sole intention in doing so is, and the result will be, to coerce its customers to refrain from dealing with it, although the remote object sought is a benefit to its own members, and no physical coercion is practised; and that the fact that each member of a labor union has a right to withdraw his patronage from a given concern and those who deal with it does not make valid a combination of all the members to do the same thing by concert of action.

The earlier cases dealing with the right of a labor union to notify its members not to deal with a certain individual may be found collated in notes in 16 L.R.A.(N.S.) 85, and 18 L.R.A.(N.S.) 707.

As appears by the note accompanying this case in 32 L.R.A.(N.S.) 748, the weight and trend of authority sustain the doctrine asserted by Justices Van Orsdel and Shepard in the foregoing decision, that each member of a labor organization has the absolute right to bestow his patronage where he chooses, and the fact that he exercises this right in concert with his comembers does not render his otherwise lawful act unlawful, or make concerted action in this regard a wrongful conspiracy, such members being interested in bringing to a successful issue an industrial controversy between members of a labor organization and the person or manufacturer whose product, by a concerted action, such members had ceased to use. By the weight of authority, an act lawful if done by one is not necessarily rendered unlawful by the mere fact of concerted action. To render such a concerted act unlawful, the object or the means used must be unlawful, or exercised for the malicious purpose of injuring another, rather than benefiting the persons engaged therein; mere concert of action, in and of itself, not being sufficient. On the other hand it does not follow merely because some act or course of conduct by an individual does not amount to an actionable wrong, that the same act or course of conduct by a combination of persons would not be actionable. If the act or course of conduct is in the exercise of a qualified right, as distinguished from an absolute right, the test as to the lawfulness of concerted action is whether there is any lawful object or purpose common to such persons which that course of conduct is reasonably and fairly calculated to promote, and whether they act in good faith, for the primary purpose of promoting that object, or wilfully, for the primary purpose of injuring another.

The decision of the court in American Federation of Labor v. Buck's Stove & Range Company was appealed to the Supreme Court of the United States; but it appearing during the argument on the appeal that the parties to the case had settled their differences, the appeals were dismissed on the ground that the questions raised were moot. 219 U. S. 581, 55 L. ed. —, 31 Sup. Ct. Rep. 472.

Limitation of actions — injury to bridge. In those jurisdictions where the rule prevails that the statute of limitations may be interposed as a defense to all actions by municipal corporations to enforce mere private rights, while it is no defense to those involving public rights, the real question in each case becomes whether the municipality is seeking to enforce a public right or a private right.

In Chicago v. Dunham Towing & Wrecking Co. 246 Ill. 29, 92 N. E. 566, annotated in 32 L.R.A.(N.S.) 245, it is held that the statute of limitations will run against the right of a municipal corporation to recover for injury to a bridge which it is bound to maintain and keep in repair as part of its highway system, although it is held in trust for the public, since the right sought to be enforced is a mere private right.

Mortgage — collateral — enforcement by assignee. The question whether a purchaser of collateral may enforce it for more than the amount of the debt secured was presented in Peacock v. Phillips, 247 Ill. 467, 93 N. E. 415, annotated in 32 L.R.A.(N.S.) 42, holding that one who, with knowledge of the facts, purchases a note and mortgage held by a bank as collateral for a note of less amount executed by one of the makers of the mortgage, at a sale by it in accordance with the contract, upon default in payment of its note at maturity, can enforce the collateral note and mortgage securing it only to the extent of the amount due on the obligation for which it stood as collateral.

Municipal corporations — hiring private detectives — authority. The question of authority of municipalities to employ private detectives, which seems to have been but twice before the courts, was presented in the Wisconsin case of Flannagan v. Buxton, — Wis. —, 129 N. W. 642, annotated in 32 L.R.A.(N.S.) 391, holding that power to employ private detectives to ascertain whether or not the criminal laws have been violated in a village is not conferred by charter authority to establish ordinances for the government and maintenance of good order of the village, and suppression of crime, and to appoint policemen and prescribe their duties.

Municipal corporation— negligent injury — notice — incompetency of plaintiff. That one injured by a defect in a city street is rendered mentally and physically incompetent by the injury does not excuse his failure to give the notice to the city which the statute makes a prerequisite to the maintenance of an action against it, is held in the Indiana case of Touhey v. Decatur, — Ind. —, 93 N. E. 540, annotated in 32 L.R.A.(N.S.) 351. There is considerable conflict in the decisions upon this question. In some statutes provision is made for failure to give notice because of physical or mental disabilities resulting from the accident, and under such statutes it becomes merely a question of fact as to whether the excuse given was sufficient.

Nuisance — railroad yard — liability. That the maintenance by a railroad company of a yard for the storing, blowing out, cleaning, and firing of engines is done in its private, and not its public, capacity, so that it will be liable in damages if it maintains it in such manner as to constitute a nuisance to neighboring property, is laid down in Terrell v. Chesapeake & O. R. Co. 110 Va. 340, 66 S. E. 55, accompanied in 32 L.R.A. (N.S.) 371, by note containing the recent cases which apparently proceed upon the assumption that a railroad company is responsible like an individual for the creation of a nuisance, even if it is a necessary incident to the operation of the road, and turn upon the question whether a private nuisance has in fact been established.

The early cases upon this question are covered in the notes to Missouri, K. & T. R. Co. v. Mott, 70 L.R.A. 579, and the note accompanying Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49.

The position taken in the latter note, against the doctrine that legislative authority for the performance of acts which necessarily create a private nuisance will relieve a corporation responsible for those acts from responsibility, finds strong support in an opinion by Chief Justice Whitfield in Alabama & V. R. Co. v. King, 22 L.R.A.(N.S.) 603, quoting extensively the conclusions of that note.

Sale — instalments — rescission — rights. A purchaser of a set of books to be delivered one at a time and paid for as delivered is held in Quarton v. American Law Book Co. 143 Iowa, 517, 121 N. W. 1009, estopped to insist on continued performance by the seller, where, after he has failed to pay for several books delivered, and has been notified that the contract has been rescinded, he pays no attention to demands for payment for the volumes received, and makes no demand for future deliveries for more than two years, until the price of the books has been advanced; and it is immaterial that payment for the volumes received is subsequently paid by one to whom the contract had been assigned.

The general rule in regard to the seller's right to abandon the contract in cases of this kind is, as stated in the opinion in this decision, that the seller cannot rescind unless the buyer's default is made under such circumstances as justifies an inference that he repudiates the entire contract.

What constitutes such a breach as will, under the general rule, indicate the buyer's intention to abandon, depends largely upon the facts in the individual cases. As appears by the note appended to the report of the Quarton case in 32 L.R.A.(N.S.) 1, the decisions are not in harmony on the question whether mere failure to pay is enough, but if there is failure to pay when it is apparent that no general credit was intended, or if there is a refusal to pay, or if the buyer withholds payment and attempts to impose terms on the seller not found in the contract, it has usually been held that the seller may refuse to make further deliveries.

Sale — horse — warranty — unmanageability. What character or extent of injury arising from disease or accident will constitute a breach of warranty of soundness of a horse is a question that has been repeatedly before the courts of this country and England. Although some difference of opinion is found to have existed upon the point, yet the general rule is believed to be now settled. Perhaps it has been best stated by Baron Parke, who in Kiddell v. Burnard, 9 Mees. & W. 668, following the tenor of his ruling in the earlier case of Coates v. Stephens, 2 Moody & R. 157, defined the effect of a warranty of soundness in a horse as follows: "The rule as to unsoundness is that, if at the time of sale the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound."

This rule was applied in the Connecticut case of Andrews v. Peck, — Conn. —, 78 Atl. 445, annotated in 32 L.R.A. (N.S.) 181, holding that the fact that a horse is unmanageable while being shod does not breach a warranty that he is sound.

Will — power of sale. That a power of sale will be implied from a provision of a will vesting real estate in trustees with power to "invest and manage the same," unless a contrary intent can be found in the will taken as a whole, is held in Robinson v. Robinson, 105 Me. 68, 72 Atl. 883. This case is accompanied in 32 L.R.A.(N.S.) 675, by the decisions which disclose what phraseology, not amounting to express authority, in a will or trust deed, will confer power upon an executor or trustee to sell real property, without first resorting to the courts for a license.

Recent English and Canadian Decisions

Automobiles — contributory negligence. That the usual rule of ordinary care does not impose on travelers the burden of being constantly on the lookout for automobiles, but that they are entitled to rely on statutory warnings being given, is held in Toronto General T. Corp. v. Dunn, 20 Man. Rep. 412.

Bailment — duty of warehouseman to notify bailor of adverse claim. A warehouseman is not protected by a court order for the delivery of goods to an adverse claimant where he not only failed to notify the bailor that proceedings had been taken to procure such order, but himself suggested to the claimant that such an order be procured. His duty is not fulfilled simply by telling the magistrate who issued the order that there was a claimant to the goods other than the person who had taken out the summons. Ranson v. Platt [1911] 2 K. B. 291.

Conflict of laws — enforcing award of damages made by foreign court in criminal proceedings. The rule of international law which prohibits courts of justice from executing the penal judgments of a foreign court does not preclude the enforcement in England of an award of damages made in pursuance of the law of France by which one injured by a crime is permitted to intervene in the prosecution and put in a claim for damages, which is tried along with the criminal charge, and upon which damages are awarded by the same judgment which imposes the punishment, as in such case the judgment is severable. Raulin v. Fischer [1911] 2 K. B. 93.

Conviction as evidence in civil proceeding of commission of crime. Among the *sequelæ* of the Crippen Case, which attained considerable notoriety on both sides of the Atlantic, is a decision made in a contest for a grant of administration upon the estate of Mrs. Crippen between the latter's sister and Miss LeNeve, whose claim is established upon the fact of her being the sole executrix and universal legatee. In seeking to apply the rule that no person, nor his representative claiming under him, can obtain or enforce any rights resulting to him from his own crime, the court held that a certified copy of the conviction for the murder of his wife was admissible in evidence, not only as proof of the conviction, but also as prima facie evidence of the commission of the crime, and was not objectionable as *res inter alios acta*. Re Crippen [1911] P. 108.

Another sequel of this affair is the suspension from practising for twelve months of Dr. Crippen's solicitor, who was shown to have been a party in the interest of a newspaper which contributed toward the expenses of the defense, to the concocting of a fictitious letter from the condemned man to be published in the newspaper, and who was also shown to have appended his name as solicitor.

Gift — setting aside for undue influence. The circumstances under which a fiduciary relation between the parties will give rise to a presumption of undue influence are interestingly discussed in Re Coomber [1911] 1 Ch. 723, in which it is held that it is not every fiduciary relation between donor and donee which will induce a court of equity to set aside a gift, but only those special relations which from their nature raise such a presumption; and that the fact that the donee, who was the donor's son, was her agent in managing the property which formed the subject of the gift, did not connote such special relation.

Married women's separate estate — liability for funeral expenses. In the absence of a statute making such expenses a charge upon the separate estate of a married woman, or unless she has charged her funeral expenses by will upon her estate, a husband cannot recover from his wife's estate money disbursed for such expenses. The duty of a husband to bury his dead wife at his own charge is not based upon nor incidental to the marital right at common law to reduce his wife's personal property to his own possession, but is founded on the marriage relation itself. Re Montgomery, 20 Man. Rep. 444.

Wills — bequest during widowhood — invalid marriage. A woman whose husband disappeared without any luggage with him, or leaving any reasons behind him, and who six years afterward goes through a ceremony of marriage with a man who is cognizant of the situation, and who makes certain bequests to her "during widowhood, and after her decease or second marriage" to his daughters, is entitled to enjoy the property until she dies or remarries, although it turns out that her first husband is still alive. Re Hammond, 27 Times Law Rep. 522. While a reference to widowhood may import a condition that the property is only to be enjoyed if the marriage was a valid one, such a condition will not be imported unless clearly required by the words of the will. Such a condition in this case would, in view of the husband's knowledge of the situation, be clearly both capricious and unjust.

Quaint and Curious

Although a learned clerk he dearly loved to muse upon the oddity of a quaint conceit.

Employers' Liability. When a few years ago British employers became liable at law for injuries suffered by employees in the course of their work, says the New York Sun, cartoonists got busy depicting the hired girl gleefully tumbling down stairs with the tea tray or the coal box, secure in the prospect of a long rest and no loss of wages. Householders, of course, cover their risk by insuring each employee against accidents. English courts as a rule place a liberal construction on the word "accident," and accordingly on the books of the insurance companies may be found many odd claims. Here are a few:

A cow whisking her tail caused injury to a milkmaid's eye.

A farm hand was stung by a bee.

A manservant sprained his leg through stamping on a rat.

A coachman coming out of a stable was struck on the face by his master's boot, intended for a caterwauling cat.

A cook was breaking coal and a piece went down her throat.

A curate was scalded through stumbling while carrying a tea urn at a parochial gathering.

A servant was pricked by a rusty needle while sewing on a button on her employer's clothes.

It is somewhat difficult to imagine that success could attend claims like these:

A servant received a shock through seeing a large Teddy bear when the room was only dimly lighted.

Another servant fetching coal out of a cellar collapsed from fright caused by the silent appearance of a washerwoman, and broke her arm.

Bidden to the Feast. A number of judges, lawyers, and other gentlemen known in legal circles, were recently invited to help Fred C. Olney, the Wakefield, Rhode Island, attorney, celebrate his birthday.

Mr. Olney is commodore of the Wakefield Yacht Club and the festivities were held there. He sent the following invitation to a large number of his local friends:

"Dear Sir—On Saturday the 15th inst., occurs a marked day, to wit, the natal day of your humble servant. I have arranged to celebrate the event by entertaining a number of my particular friends at the Wakefield Yacht Club, and you are among the number. No refusal will be accepted. Habeas corpus will issue in such event. Arrange to take the train that will get you in Kingston around 8:45 A. M.

"At all events do not disappoint. Everything is in readiness; till then Au Revoir.

Very truly yours,
F. C. Olney."

Mr. Olney's reputation as a genial and bountiful host is such that resort to legal process was not necessary. Unlike the man of old who "made a great supper and bade many" he did not have to "go out into the highways and hedges and compel them to come in."

Pretty Cheap, at That. The mayor of Wabash, Indiana, fined himself $1 for auto speeding and promptly paid the fine. He didn't talk back to himself, or he might have been fined an additional dollar.

Jersey Justice. In a little town "over in Jersey" abode John Tinklepaugh, a German justice of the peace. He was famed for an utter darkness as to law and a marvelous capacity for deciding cases in the direction of his friends. Sometimes, however, he astonished by his absolute fairness.

One day a little case was to be tried before him. The defendant engaged the services of a lawyer, old and eminent now, but then a young practitioner. The lawyer regarded as useless any attempt to win the case before the German, and

advised his client that all they could do was to remain silent, give no testimony, and take an appeal. On the day set, Bacus, as we will call the attorney, and his client appeared, and the plaintiff, who had no lawyer to represent him, told his story. It was not strong and did not make out a case, nor did the two or three witnesses he produced. Studying the situation for a second, his honor said:

"I haf myself some knowletch of dis gase, and onless some objection is made, I will also geef my testimony already."

No one objected, so the justice went on in a heavy and emphatic way to make a complete case for the plaintiff, having first held his hand on high and administered an oath to himself "to dell the druth, the whole druth, and nothing the druth besides yet."

While he was testifying a bystander whispered to Bacus that he would not believe the old liar under oath. This gave Bacus an idea, and when the justice ended his testimony he signified a wish to put in testimony as to the character of one of the plaintiff's witnesses. Four bystanders were called and sworn. One of them took the stand.

"Do you know John Tinklepaugh?" asked Bacus.

"Yes."

"Are you acquainted with his reputation for truth and veracity in the community where he resides?"

"Yes."

"Is he good or bad?"

"Bad, sir," said the witness; and then continuing with great liberality: "He's a well-known liar. I wouldn't believe him under oath."

The three others gave similar testimony, and Bacus rested his case. The justice made no sign while the evidence was going on, and gave his decision in these words:

"Dese blaintiff brings dis gase for a chudgment against dis defendant. His own desdimoney is no goot, also his vitnesses, except John Tinklepaugh's (his own). His evidence is fool and complete, and put for one thing ve don't get no trouble at all. But here is four vitnesses who know John Tinklepaugh and four swears he ees a liar and his wort is no goot and dat dey vouldn't beleef him unter oat. When such is done dot's vot's is galled some imbeachments, and a vitness who gets himself imbeached once is drowned de gase out. So oud goes John Tinklepaugh. Dis makes it so I must gif chudgments for dot defendant, vich I now does. De blaintiff bays der gosts. Gonstable, make der gourt oud."

"Go About Your Business." The old Temple clock in London bears a curious inscription, the origin of which is ascribed to a chance remark.

Some two hundred years or so ago a master workman was employed to repair and put in a new face upon the clock. When his work was nearly done he asked the benchers for an appropriate motto to carve upon the base. They promised to think of one. Week after week he came for their decision, but was put off. One day he found them at dinner in commons.

"What motto shall I put on the clock, your lordships?" he asked of a learned judge.

"Oh, go about your business!" his Honor cried, angrily.

"And very suitable for a lazy, dawdling gang!" the clock maker is said to have muttered, as he retreated. It is certain that he carved "Go about your business" on the base.

The lawyers decided that no better warning could be given them at any hour of the day, and there the inscription still remains.—Harper's Weekly.

Trial of Animals. The dumb animal has often been tried and executed with the proper legal formalities, even in England, says the London Chronicle, and as late as the nineteenth century. In that enlightened land a cock has been tried, found guilty, and burned at the stake for the crime of laying an egg.

A correspondent reminds us of Chassenée, the eminent French jurist, who defended certain rats accused of destroying a barley crop, and obtained a postponement on the ground that so many defendants could not be reached by a single summons.

The following strange incident, states the San Francisco Call, is related by Captain George A. Briggs, and occurred during his stay on the west coast of Africa about ten years ago. A chimpan-

zee named John who was owned by a high official one day broke from his chain and, strolling unconcernedly down the main thoroughfare, scattered the crowds before him. A native woman who was vending dainties dropped her tray and, even forgetting her small child, fled with the crowd.

The chimpanzee soon spied the tray of dainties and devoured them in a most convincing manner. The child, seeing all the sweets disappear, attacked the chimpanzee by the tail, but a bite from the brute sent the child yelling at the top of his lung power.

This so infuriated the natives that they made a combined attack on John, and his lease of life would have been cut short had not his owner appeared. He faced the crowd and assured them that every man would be tendered his due. For a similar offense he inquired whether a man would not have to stand his trial in court.

"Yah! Yah!" was the shout.

"Then," said John's owner, "Let the woman appear in court to-morrow with the child and all the witnesses, and I promise you John will be there like a man to stand trial and take whatever punishment may be doled out to him."

The next morning the court was crowded when John appeared, chained and carried by several policemen. He was placed in the dock, and the charge of larceny and assault was read to him.

His master turned to him and, asking him if he had any defense to offer, was answered by the usual grunts of delight that John indulged in whenever his master greeted him.

The master then informed the judge that John had pleaded guilty and had no defense to offer. The judge, after due deliberation, sentenced the brute to three months, and he was led away to prison, where he served his sentence.

A Brief Inspection. An Indian judge, when first appointed to his position, says the Bombay Gazette, was not well acquainted with Hindustani. He was trying a case in which a Hindu was charged with stealing a "nilghai." The judge did not like to betray his ignorance of what a nilghai was, so he said, "Produce the stolen property."

The court was held in an upper room, so the usher gasped, "Please, your Lordship, it's downstairs."

"Then bring it up instantly!" sternly ordered the judge.

The official departed, and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open, and the panting official appeared dragging in the blue bull.

The judge was dumfounded, but only for an instant.

"Ah! That will do," said he. "It is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher."

The Ghost Walked. The mistaken idea that one's troubles end with death is set aside in Starwich v. Washington Cut Glass Co. 21 Wash. Dec. No. 13 (Adv. Sheets), in which the supreme court of Washington first announces that the defendant corporation "gave up the ghost." How it died is not fully apparent, but, having yielded its spirit to the one who made it, it still retained its worldly cares, for in the next sentence the court says: "But that did not deliver it from the *burden* of its contracts."

Evidently, in this case, the ghost walked, being "in torment." Who shall henceforth say that corporations have no souls?

The Law's Delay. This little incident recently occurred in the superior court in the state of Washington.

The court had just sustained a motion requiring the plaintiff to bring in additional parties, and permission had been asked to file an amended complaint. In asking the plaintiff's counsel (who happened to be a retired judge) how much time he desired to amend, his Honor said: "How many years do you desire in which to file your amended complaint?"

The Decision in a Nutshell. I do not see the interesting Wilbraham case reported by Rice and Wilbur Fisk, cited by White, Ch. J., writes F. B. Sanborn in the Springfield Republican in speaking of the Tobacco Cases,—but it is plainly the leading case of this great lawsuit,

and I will revive the memory of it. A Methodist divinity student at Wilbraham, in the years ennobled by Father Taylor and Bishop Haven, went forth to preach his trial sermon, one Sunday. Returning to the tabernacle of Dr. Fiske, the following interlocutory pleading was put in:

"Dr. F.—My young brother, how were you favored in your discourse yesterday?

Div. S.—I couldn't feel sure, doctor, but I thought I got along pretty well.

Dr. F.—Your text?

D. S.—How shall ye escape if ye neglect so great a salvation?

Dr. F.—A very good text; how did you improve it?

D. S.—Divided it under two heads; 1st, I showed 'em how great this salvation is; 2d, I told 'em how they might escape if they neglected it."

The court, in the tobacco cases, not only told the culprits how they may escape, but about how many months the proceedings will occupy in the lower courts.

Odd Sentences. "Break rock for 100 days or go to church every Sunday for six months" was the sentence imposed upon three Kansas City, Missouri, boys, after they had been convicted of throwing eggs at pedestrians.

"I sentence this boy to a whipping every morning for a month. Not the namby pamby kind, but good, real hard ones; ones that'll make him eat off a mantlepiece. You'll find then that he'll develop into a good boy." This was the remedy prescribed by magisterial wisdom in the case of an eight-year-old boy who, his mother said, had a mania for running away from home.

Would Enjoin Prayer. Because the prayers for rain offered up by a devout minister during a recent dry spell were followed by such a copious and prolonged downpour that their cotton crop was damaged, his neighbors threatened to go into court and get an injunction restraining him from offering such prayers in the future. After much talk the proposed proceedings have been dropped.

A Continued Story in a Will. A man of wealth may not always be able to control his children's matrimonial courses, but he may reserve the privilege of telling what he thinks about them. Such a privilege has been exercised by a New York millionaire whose daughter had married widely, and not always well. The father has expressed his varying views of her conduct in a string of codicils to his will. These codicils number fifteen. The will is less a will than a diary.

The fluctuations in the mind of a disapproving parent are definitely expressed in dollars. The provision he makes for his wilful daughter falls from $70,000 a year to $12,000, rises to $80,000, and finally sinks to such narrow limits as the discretion of the executors may see fit to set. The financial thermometer mounts and falls in correspondence with the domestic situation.

In Scarlet and Ermine. An important amendment has been added to the French law for the trial of offenses committed by children of less than thirteen, outside the jurisdiction of the public law courts.

It permits woman lawyers to act as magistrates in children's cases. Before very long there will be woman judges on the bench in Paris, and this new law will in all probability permit the woman magistrate to wear scarlet robes edged with ermine, as do the male magistrates in the French law courts.

New Books and Recent Articles

"The Origin and Growth of the American Constitution." By Hon. Hannis Taylor (Houghton Mifflin Co.) $4 net.

The author of this notable book has devoted thirty-six years of his life to a study of the Constitutions of England and the United States. His excellent treatise on "The Origin and Growth of the English Constitution" was a splendid preparation for a similar treatment of American institutions, and he brought to his present study a wealth of learning augmented by a wide experience in public, professional, and diplomatic life.

The author's denial of the so-called inspiration theory of the origin of our Constitution, and his contention that the wholly novel theory of a Federal government was the invention of Pelatiah Webster, are interesting and unusual features of the work.

The chapter devoted to the evolution of the typical American state traces our American democracy back, with a wealth of historic detail, through English institutions to primitive Teutonic democracy. The chapters on "The Federal Convention and Its Work" and "The First Twelve Articles of Amendment" present in concise form the learning upon these important subjects. African slavery and its consequences are discussed in a fair and judicial way in another chapter. The rise of nationalism is traced in subsequent chapters, as well as our colonial system, interstate commerce, and the outcome of our growth.

The author has treated his subject in a graphic and interesting way, and has brought a wide range of information within the limits of a single volume. It is a highly valuable contribution to the literature of our constitutional law.

"Ethical Obligations of the Lawyer." By Gleason L. Archer, LL.B. (Little, Brown & Co.) $3.

The author of this valuable work is dean of the Suffolk School of Law. He has made a thorough study of the rules of legal ethics, and has pointed out their application, in a helpful way, in many concrete instances. Believing that the practitioner who has pondered upon ethical problems will be more likely to act wisely when suddenly confronted by moral issues, the author has aimed to encourage thought along such lines as will equip the lawyer to meet all probable emergencies.

The subject of ethics has been much neglected in the past, it being evidently supposed that each member of the profession could be intuitively his own monitor. The recent movements aimed to elevate legal standards, however, have created a demand for all the aid that the wisdom of the past can give. In this movement the Bar Associations have led the way and have adopted excellent codes. But a practical explanation of the principles upon which those codes are founded has been lacking. This want, the author of this volume has attempted to fill. He has gathered from many sources the established customs and approved traditions of the bar, and has pointed out their necessity and value in an instructive and methodical way.

The duties of a lawyer to the state, to the court, to his client, to the adverse party, and to his fellow practitioners are clearly presented, and many suggestions given that are well worth knowing.

"Beecher's Law of Wills in Michigan with Forms." By Franklin A. Beecher. 1 vol. $4.

"The American People; A Study in National Psychology." By A. Maurice Low. $4.25 net.

"A Philadelphia Lawyer in the London Courts." By Thomas Leaming. $2 net.

"Crime and Insanity." By Dr. C. A. Mercier. $.75 net.

Recent Legal Articles in Journals and Magazines

Act of God.

"Storms and Tempests as Acts of God."—18 Case and Comment, 126.

Aerial Legislation.

"Present and Proposed Aerial Legislation."—18 Case and Comment, 134.

Air.

"Let the Air Remain Free."—18 Case and Comment, 119.

"The Law of the Air."—18 Case and Comment, 131.

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"A Sidelight on Unreasonable Restraint."—42 National Corporation Reporter, 845.

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"Motorists and Manslaughter."—75 Justice of the Peace, 351.

Banks.

"Trust Companies and the Legal Profession."—Trust Companies, July 1911, p. 24.

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"Illinois State Bar Association."—43 Chicago Legal News, 393.

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"The Negotiable Instruments Law."—28 Banking Law Journal, 560.

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"Fees for the Service of Licensing Notices."—75 Justice of the Peace, 325.

France.
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"Current Notes on International Law."—43 Chicago Legal News, 394.

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"The Lawyer, His Use and Abuse."—18 Case and Comment, 149.

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"Progressive State Legislation."—22 World's Work, 14680.

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"Limitation of Actions."—42 National Corporation Reporter, 781.
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"The New York Employers' Liability Act."—9 Mich. Law Review, 684.
"Relation of Assumption of Risk to Contributory Negligence."—15 Law Notes, 64.

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"The Collapse of the Diaz Legend."—37 McClure's Magazine, 395.

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"Ordinances Regarding Advertising in Streets."—73 Central Law Journal, 73.
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"Joint and Several Liability of Partners."—19 Law Student's Helper, 248.

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"Old-Age Pensions."—75 Justice of the Peace, 303.

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"Pleas in Equity, and the Proper Mode of Testing."—17 Virginia Law Register, 257.

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"The Naval Prize Bill and the Declaration of London."—131 Law Times, 212.

Recall.
"Constitutional Recall in Oregon."—15 Law Notes, 81.
"The Recall of Judges a Rash Experiment."—82 Century Magazine, 624.

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"The Judicial Code of March 3, 1911."—9 Michigan Law Review, 697.

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"The Rateability of Sewers."—75 Justice of the Peace, 301.

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"The Caseless Law of Wireless Telegraphy."—18 Case and Comment, 138.

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"Thackeray and the Law."—46 London Law Journal, 444.

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"The Transfer of Trademarks and Tradenames."—19 Law Student's Helper, 232.

Tuberculosis.
"The Final Report of the Royal Commission on Tuberculosis."—75 Justice of the Peace, 339.

War.
"The Aeroplane and the Battleship."—18 Case and Comment, 143.

Wills.
"Widow's Renunciation and Acceleration of Distribution."—17 Virginia Law Register, 177.

Women.
"The Women of the Cæsars."—82 Century Magazine, 610.

Mr. H. V. Mercer, of Minneapolis, read at the recent session of the Minnesota State Bar Association a report of special work on Workmen's Compensation. Mr. Mercer has studied the question in Europe and has been prominent in the Interstate Conferences. The Code recommended to the Minnesota Legislature by the commission of which he was a member provides for single compulsory compensation, irrespective of actual fault, in all dangerous employments, with permissible insurance, and the power to equitably assess the employees to pay the cost above a certain percentage.

Mr. Mercer is not prepared to admit that state insurance is the best legislation under our form of government, nor does he favor legislation which allows one or both parties to elect whether they will come under the law. He considers that many of the laws enacted have been drawn without proper comprehension of the remote consequences; that too many of them fail to recognize this as a revolutionary move where actual fault should be forgotten and not mixed with the rule of public welfare as protected from dangerous agencies.

Says Mr. Mercer: "So far as we are aware, the students of the subject who have no paternalistic notion of taxation or state insurance would prefer our theory in its fundamentals, if they were sure of its validity. Upon the other hand, we have no doubt whatever that in its essentials our theory of repealing the common law, making a direct, single, certain remedy in all dangerous employments, and permitting insurance, is much the safer. Since its publication, other decisions of the United States Court more than conform to the principles involved here. Our fire insurance law furnishes a strong example.

"We are not unmindful of the hope, some entertain, of a Federal scheme of taxation. As to the validity of such a scheme, we are not sufficiently advised. Our understanding, however, is that the police power was the basis of the Oklahoma bank insurance decision, and that that power, within the states, the government has not. Whether the court would give its broad interpretation to the taxing power for a subject outside of Federal domain may well be doubted. Still, doubts can be removed upon reason shown."

Judges and Lawyers

A tribute to judicial and professional worth.

Hon. Reuben R. Gaines

Ex-Chief Justice of Texas

JUDGE R. R. Gaines was born in Sumpter County, Alabama, on the 30th day of October, 1836. His parents removed to Adams county, of that state, where he was reared and in 1855 he graduated from the University of Alabama. After receiving his diploma he began his preparation for the legal profession, receiving a diploma from the Law School at Lebanon, Tennessee, in 1857. He practised law in the courts of Alabama with success until the beginning of the war between the states.

HON. REUBEN R. GAINES

The young lawyer was married to Miss Louise Shortridge in 1859, of which marriage now survives a daughter, Mrs. Gwathmey, of New York City. This well-mated couple have lived together for more than half a century, in which time they have been in the sunshine and shadows of life, the common lot of man, and they now enjoy their well-earned competency and honors.

When troops were called for, Mr. Gaines left his young wife, as did thousands, and entered the Confederate Army, serving with General John H. Morgan, of Alabama, and subsequently with General Anderson, being adjutant to each brigade.

When the war closed he found conditions in his native state so changed that in 1866 he, with his wife, removed to Texas and located at Clarksville, in Red River county, then an important business center. His thorough preparation for the practice of his profession was readily recognized, and Colonel B. H. Epperson, a prominent and able lawyer, offered to him a partnership, which was accepted, and the firm did a lucrative practice until 1876, when the attorneys of the sixth judicial district of Texas, composed of Red River, Lamar, Fannin, and Grayson counties, met in convention at Paris to select a candidate for judge of the district court of that district. They selected R. R. Gaines, because of superior qualifications, to be presented to the people. The nomination came unsought and the nominee was elected without opposition. In those days judges were not nominated by political conventions, neither did they enter into a house to house campaign. The bar had such standing with the people that their indorsement was equivalent to an election.

Judge Gaines served by re-election as judge of that district for eight years, and retired voluntarily against the earnest protest of the bar and people of the district. He resumed practice at Paris, to which city he had removed, until 1886, when the State Democratic Convention nominated him for associate justice of the Supreme court of the state, and by successive elections without opposition he served in that position until 1894, when the death of Chief Justice Stayton caused a vacancy, and Judge Gaines was appointed to fill that place by Governor Hogg, who knew men by intuition. In the same year he was, without opposition, elected chief justice, in which he was continued by re-election until January, 1911, when he resigned on account of ill health, having served on the supreme court for more than twenty-four years, the longest service of any man who has occupied a position on that court.

The opinions written by Judge Gaines are to be found in volumes 66 to 103, inclusive, of the supreme court repvorts. Those opinions attest the author's learning and his faithful and patient investigation of every question. Prominent in all of his work is the fact that the rule of right and just dealing was his guide for the solution of all questions submitted for his decision.

Judge Gaines served upon the supreme court with the best class of judges, and his work places him in the front rank with the ablest lawyers and judges of the state. His genial disposition made him a most lovable associate and a friend ever welcome. He drew to him all who came within his influence and made of them lasting friends. No man in any station in life had a larger circle of close and devoted friends. The keenest sympathy for him in his affliction prevails in all parts of the state, and his recovery would give real pleasure to the people of Texas.

Hon. Marcus P. Knowtlon, Chief Justice of the Massachusetts Supreme Judicial Court, has tendered his resignation, to take effect September 7, 1911. An affliction of the eyes, which has prevented his taking part in the deliberations of the court, is the reason for his retirement.

A DISTINGUISHED VIRGINIA JURIST

HONORABLE Stafford G. Whittle is a Virginian by birth, having been born in Mecklenburg county, on December 5th, 1849. His academic education was acquired at Washington and Lee University. He studied law at the University of Virginia in 1869 and 1870, and was admitted to the bar in Martinsville in 1871, where he actively engaged in the practice of his profession for the next ten years.

HON. S. G. WHITTLE

In February, 1881, he was appointed by Governor Holladay judge of the fourth judicial circuit, which then embraced the counties of Henry, Patrick, Halifax, Franklin, Pittsylvania, and the city of Danville. Later Campbell county and the city of Lynchburg were added to the circuit. His decisions while on the bench of the circuit court were rarely ever reversed by the higher courts. On January 31st, 1910, he was chosen by the legislature a member of the supreme court of appeals, which position he still occupies.

One who knows Judge Whittle well says: "His mind is quick, clear, strong, comprehensive, discriminating, judicial, and thoroughly imbued with the principles of jurisprudence. Among his chief characteristics are his industry and high sense of duty and responsibility. He listens, with patience and courtesy, to the arguments of counsel. In appreciating the value and force of an argument, and expressing his own opinions, in strong, clear, convincing language, he is pre-eminent. He has always delighted in the law. His qualifications, morally and intellectually, added to his many attractive qualities as a man, render him an ideal judge." In his long service on the bench he has earned the confidence and respect of the bar and the public.

CONNECTICUT'S CHIEF JUSTICE

HON. F. B. HALL

FREDERIC Byron Hall, chief justice of the supreme court of errors of the state of Connecticut, was born at Saratoga Springs, New York, February 20, 1843.

His first occupation was that of newsboy in his native town. After removal to Connecticut in 1858, he worked as a molder in the foundry of the Wheeler & Wilson Sewing Machine Company, in Bridgeport.

His college preparatory course was taken at the Connecticut Literary Institute, in Suffield, Connecticut.

In 1862, he enlisted as a private soldier in the Seventeenth Connecticut and was discharged for physical disability consequent upon typhoid fever contracted in the service.

His bachelor's degree was obtained at Brown University in 1867.

Judge Hall studied law in the office of Henry S. Sanford, of Bridgeport, where he was admitted to the bar in 1870, and where he has lived ever since. His law partner during seven years' practice was the late Goodwin Stoddard.

In 1877, Judge Hall began his judicial career on the bench of the court of common pleas of Fairfield county.

Twelve years later he was appointed judge of the superior court of the state; in 1897, associate justice, and in 1909, chief justice of the supreme court of errors, his term as chief justice commencing in February, 1910.

This record, thus briefly told, contains proof of the solid merit of Connecticut's chief justice. There were no accidents to account for his progress from a newsboy and iron molder to the head of the state's judiciary. Without means he worked his way through school and college. And his able work as a judge earned his advancement from bench to bench. This signifies a typical American self-made man.

Chief Justice Hall's is the true judicial character, shown by quick discernment of the value of testimony and of the merits of cases, by dignity and reserve, by courtesy and attentiveness, by knowledge of the law and good sense in the use of it to do justice, and by clear and concise statement in his opinions and decisions.

Yale and Brown Universities conferred upon Judge Hall the degree of master of arts in 1890, and Brown, that of doctor of laws in 1909.

Political Leader and Lawyer Dies

Edward Morse Shepard, New York lawyer and Democratic political leader, who had been ill since the contraction of a cold in New York on June 16, died at his summer home here last night of pneumonia. The members of his family were at the bedside.

Mr. Shepard identified himself with the reform element in politics and had been mentioned for many public offices in the city and state. He was born in New York city July 23, 1850. He loomed large in political life when, as a Platt general, he directed the prosecution of the noted boss, John Y. McKane, and twenty other offenders for ballot stuffing at Coney Island in 1893.

Though he had ofttimes warred against Tammany Hall, he was made the Democratic candidate for mayor in 1901, but was defeated. Last year he was strongly considered as a candidate for governor of the state, and later was urged for United States Senator to succeed Chauncey M. Depew.

Mr. Shepard was identified as a director with many Mexican mining enterprises. He wrote numerous articles and monographs on social, economic, and political subjects and was a member of many New York clubs.

Pioneer Woman Lawyer Dies

Mrs. Belle A. Mansfield, sixty-five years old, the first woman ever admitted to the practice of law in the United States, died suddenly at the home of her brother, Judge W. J. Babb, of Aurora, on August 1st.

UTAH'S CHIEF JUSTICE

HON. J. E. FRICK

HONORABLE J. E. Frick was born at Tiffin, Ohio, August 6th, 1848. In 1854 his parents removed to Iowa, and he received his education in the common schools of that state. He studied law, and in 1880 was admitted to practice in the courts of the state of Iowa. Thereafter he removed to the state of Nebraska, and for seventeen years was engaged in a general law practice in Fremont, Dodge county, Nebraska. In that state he practised in all the courts, state and Federal. In 1897 he came to Utah, and there was admitted to practice and practised in the state and Federal courts. He never held any elective office prior to his election to the office of associate justice of the supreme court of Utah in November, 1906, to which office he was first appointed by Governor J. C. Cutler on October 1, 1906. On January 1st, 1911, he became chief justice by vitue of the statute of Utah which provides that the justice whose elective term of office expires first shall be the chief justice.

Judge Frick was married in 1872 to Catherine L. Kunz, and they have reared a family of three children, one boy and two girls, all of whom reside in Salt Lake City.

Demise of Noted Admiralty Lawyer.

Robert Dewey Benedict, a widely known admiralty lawyer and a member of the late firm of Benedict & Benedict, died on July 29th, in Burlington, Vermont. Mr. Benedict was born in Burlington in 1829.

Aged New York Lawyer Dies.

Mr. Charles F. Southmayd, a retired lawyer, who was associated with Mr. William M. Evarts, died at his home in New York on July 11th.

MICHIGAN'S ATTORNEY GENERAL

HON. F. C. KUHN

HONORABLE Franz C. Kuhn is a native of Detroit, having been born in that city on February 8th, 1872. He obtained his early education in the public schools of the city of Mt. Clemens, graduating from the high school in 1889. He then attended the University of Michigan, graduating from the Literary Department in 1893 and from the Law Department in 1894. In the same year he was elected circuit court commissioner of Macomb county and was re-elected in 1896. He became prosecuting attorney of the same county in 1898, and held this position by successive re-elections until 1904, when he was chosen judge of probate. While still holding this office, he was, on June 6th, 1910, appointed Attorney General of the state of Michigan, and elected to that position by the people in November, 1910.

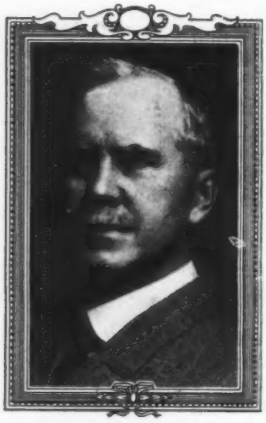
On Attorney General Kuhn's accession to office, the important litigation pending involved largely tax matters, the most important probably being the attack of the telephone and telegraph companies upon the law which placed them under the ad valorem system of taxation. The state has also important litigation pending concerning the railroads.

Attorney General Kuhn is conducting the work of his department in a vigorous and successful manner.

Death of Noted California Lawyer.

John B. Bicknell, an associate of the late Stephen M. White, and, until his retirement a few years ago, the senior member of the law firm of Bicknell, Gibson, Trask, & Crutcher, died recently at his home in Los Angeles, California. He was 73 years old.

[CONNECTICUT'S ATTORNEY GENERAL



HON. JOHN H. LIGHT

Honorable John H. Light, who was last November elected to the office of Attorney General for the state of Connecticut, may very properly be placed in the class known as self-made men. Born March 27th, 1855, in Carmel, New York, the son of Belden and Ann Light, his boyhood days were spent on his father's farm, and he received his early education in the district schools. Having a keen and active mind and retentive memory, he soon developed a taste for study, and prepared for Chamberlain Institute, through which he worked his way by tutoring and teaching, and from which he graduated with honors in 1880. He was then offered a professorship in the Institute, which he declined in order to take up the study of law.

He entered the office of Levi Warner, Esq., of Norwalk, and in 1883 was admitted to the bar of Fairfield county, and at once began the practice of law in South Norwalk, and was almost immediately chosen corporation counsel of said city, which office he retained for twenty-four years.

He has held many offices, including that of treasurer of Fairfield county, prosecuting attorney of the criminal court of common pleas, and afterward judge of said court; representative in the general assembly for two terms, during the second of which he was speaker of the house. At the Republican Convention in September, 1910, although he had made no canvass for the place, he was nominated almost unanimously for the office of Attorney General, and, immediately upon his nomination, he was appointed by Governor Weeks to the office of Attorney General to fill the vacancy caused by the resignation of Marcus H. Holcomb, who had taken a position on the superior court bench.

At the election in November he was elected by a very large majority, and will hold the office of Attorney General for four years from January 4th, 1911.

Mr. Light has a magnificent physique, is of commanding appearance, and possesses remarkable oratorical ability. He has always been a close student of literature, history, and science, and has earned an enviable reputation as a lecturer.

Attorney General Light is a member of many clubs and fraternal organizations, among them being the South Norwalk Club, the Norwalk Yacht Club, the Old Well Lodge of Masons, Knights Templar, and Butler Lodge of Oddfellows. He is a member of the Congregational Church, but is free from bias or sectarianism, and appreciates that all churches are doing God's work.

On August 3d, 1881, he married Ida M. Lockwood, and two children were born from the marriage, J. Irving Light, now deceased, and Freeman Light.

As Attorney General, he represents the state and all of its departments and officers in all civil proceedings in which the state or any of the officers of the state may be interested, and prosecutes all civil matters on behalf of the state. He also represents the public interest in the protection of any gifts, legacies, or devices intended for public or charitable purposes.

Death of Louisville Lawyer

Judge W. O. Harris, one of the best-known lawyers of Louisville, for twenty-one years dean of the Law Department of the University of Louisville, and director of the Citizens' National Bank, died at his home in that city.

He was a member of the firm of Bullitt, Harris, & Bullitt, and became known as one of the leading authorities on common law. For a number of years he was judge of the chancery court, and handed down decisions in some of the most famous cases in the history of the state. He was also a member of the Louisville Law Library.

The Humorous Side

O! the cares that we bear, alack! alack!
When a laugh would make them fall off our back.

Not Guilty. A person looking over the list of members of the bar, prefixed to a court calendar, wrote against the name of one who was of the bustling order, "Has been accused of possessing talents." Another seeing it, immediately wrote under, "Has been tried and acquitted."

Wasted Effort. Village constable (to villager who has been knocked down by passing motorcyclist)—"You didn't see the number, but could you swear to the man?"

Villager—"I did; but I don't think 'e 'eard me."—Punch.

Futile and Useless. James Creelman, at a dinner in New York, said of an opponent of civil service:

"If this man had his way, he would render our civil service boards as futile as the career of Tom Slack.

"Tom Slack was a lawyer; but I doubt if he had a case a year. One hot afternoon he decided to take a breezy ferry ride, so he put on his door:

" 'Back in two hours.'

"On his return he found that someone had written underneath:

" 'What for?' "

Looking to the Future. "I guess I'll make a lawyer of Josh," said Farmer Corntossel.

"But your wife wants him to be a physician."

"Yes. He's got to be a professional man and we'd want to show our confidence in him. And I think it would be a heap safer to take Josh's law than his medicine."—Washington Star.

Anticipated Trouble. Breathless Urchin — "You're — wanted — down — our — court — and bring a hamblance!"

Policeman—"What do you want the ambulance for?"

Urchin—"Muvver's found the lidy wot pinched our doormat!"—Punch.

Why Ham Released the Prisoner. Hamilton Webster (called "Ham" for short) had just been elected sheriff of a county in one of the Western states. He had received strict orders to keep no prisoner in solitary confinement. One evening he found himself in possession of but two prisoners, one of whom escaped during the night.

The next morning Ham opened the cell of the one remaining, a man arrested for horse stealing, and proceeded to kick him out, remarking: "Git out of here, you pieface! You stayed in to get me in trouble over that derned solitary confinement regulation, didn't ye?"—Success.

Consolation for a Fee. A subscriber writes us that, while waiting for the elevator in one of the cheaper office buildings in the city of his residence, he scanned the directory opposite the elevator as a matter of curiosity. Among other names there was one which bore this legend:

A———— H————,

Attorney and CONSOLER at Law,

Room 16, 3d Floor.

A Potato Masher. Word comes from St. Louis that George Potato has been arrested there for smiling at girls on the street.—Walnut (Mo.) Times.

The Sporting Constable. "Waal," said the constable, after some parley with Jinks, according to Harper's Weekly. "I reckon I know speed when I see speed, and, by glory, I'll bet ye $5 ye was goin' faster'n the law allows."

"I'll bet you five I wasn't," said Jinks. "And there's the money."

He paid the constable $5, and resumed his journey.

"They is suthin' in this sportin' life after all," chuckled the constable, as he folded up the bill and placed it in his pocket.

The Only Kind He Could. Judge (severely)—How could you be so mean as to swindle people who put confidence in you?

Prisoner—Well, your honor, I'd take it as a favor if you'd tell me how to work them that don't.—Boston Transcript.

A Concurrent Opinion. John C. Bell, attorney general of Pennsylvania, tells the following story in the Metropolitan Magazine:

"In many of the interior counties of Pennsylvania there are lay judges who assist the law judges in disposing of miscellaneous cases. Several years ago there was introduced into the legislature a bill to abolish the office of lay judge. Judge ——, himself a lay judge, appeared before the senate judiciary committee at Harrisburg, which was considering the matter.

"His argument was this: 'There is before your august body a bill to abolish the office of lay judge. I am in favor of its passage. For ten years I have been a lay judge myself, sitting day by day with a judge learned in the law. But he does all the work and I have no show. In all these years I have only once been asked for a concurrent opinion and that was last week, when, after listening to two lawyers argue an equity case for three days, my colleague turned to me and said, "Judge, don't these gol durned long winded lawyers give you a pain?"'"

The Superman. In Scotland a man has reached the summit of his ambitions when he attains to the magisterial bench. There was one Scot to whom the honor seemed indeed an overwhelming one, and he tried hard to live up to it.

The individual, deeply conscious of his importance, and oblivious to his immediate surroundings, was one day proceeding along a road when he plumped into a farmer's cow.

"Mon," protested the farmer, indignant, "mind me coo!"

"Mon!" reiterated the officer. "I'm no longer a mon. I'm a baillie."—Lippincott's Magazine.

Unmarried. The Chicago woman was on the witness stand. "Are you married or unmarried?" thundered the counsel for the defense. "Unmarried, four times," replied the witness, unblushingly.—Philadelphia Record.

Dense Ignorance. When O'Dearie sued O'Mee for the payment of tenpence-three-farthings, says Answers, some people imagined that they were the most important people in the case. But this was not the opinion in Pat's district. It was he who had served O'Mee with the debated goods of O'Dearie, and he had been called to give evidence. When he returned home, he wore a big swagger.

"Shure, mither, an' it isn't aisy to be a witness," he boasted, "especially when the lawyers be such fools!"

"Were the lawyers fools?" exclaimed his mother. "Oi shouldn't have belaved it!"

"It's thrue, though," replied Pat. "It's as thrue as Oi'm sitting her, begorrah! They asked so many questions, Oi'm thinking they didn't know a blessed thing about the case!"

An Erroneous Reading. "That is a misinterpretation," said Representative Taliaferro of a certain bill. "That misinterprets the people's wishes as badly as the Jacksonville crier misinterpreted Shakspere.

"In a Jacksonville court, the other day, a lawyer quoted Shakspere, 'Who steals my purse steals trash,' to a deaf judge.

" 'What's that?' the judge demanded.

" 'Who steals my purse,' repeated the the lawyer repeated. 'Twas something, nothing; 'twas mine, 'tis his, and has been slave——'

" 'Louder! I can't hear you!' said the judge, irritably.

" 'Who steals my purse,' repeated the unfortunate lawyer, 'steals trash. 'Twas——'

" 'Can't you speak up?' growled the deaf judge.

"At this point the crier thought it time to interfere. He bent over the judge and shouted in his ear.

" 'He just says, sir, that anybody what steals his pocketbook won't get nothing.' "